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WHEN CIVIL LAW FAILS

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Martial Law and Its Legal Basis in the United States

BY

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PREFACE

THE JUSTIFICATION for the use of martial law in a democracy is difficult to obtain. To many persons its use at times is necessary; to others it smacks of tyranny. Harold W. Dodds, President of Princeton University, objects to the use of any power as an emergency measure. To him it is just the "old, old answer given throughout history by those who cannot have their own way." Walter Lippmann, in his recent book, *An Inquiry into the Principles of the Good Society,* states that fascism is martial law. However, there are times even in a democracy when extraordinary power must be used—notwithstanding the many risks that must be run when martial law is declared.

Martial law is not new to the United States. It was early made use of, and in recent years it has been resorted to far too frequently. The following pages show its legal basis and the manner in which martial law has been used in the United States. Not all the instances of its use are studied but only those that have contributed in some way to the development of martial law as a legal concept. An attempt has been made to give enough of the facts that have brought about the use of martial law so that the reader may understand the general conditions that frequently result in its declaration.

The wide divergence of view of the many writers upon this subject and the many conflicting court decisions show that great differences of opinion have existed concerning its use during the entire history of the United States. The chief objections to its use occur during industrial disputes and for political reasons. Since martial law is resorted to more frequently during labor troubles, it is high time that the courts recognize the distinction between industrial disputes and rebellion against the established government. A modified form of martial law should be permitted during the former case, while punitive martial law should be used only in a time of civil war or open rebellion.

The recent use of martial law to close industrial plants during labor disputes makes clear that its future use will be the occasion for continued controversy. It is hoped that this study, by showing the occasions and manner in which martial law has been used in the past, will draw attention to these problems and result in the formulation of clearer rules respecting the declaration of martial law and the use of troops when civil law has failed.

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ROBERT S. RANKIN.

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IT IS A DIFFICULT task for many writers interested in the development of martial law to find a true comprehensive definition of this term that will satisfy the time, place, and manner of its use. It is the law of necessity, and necessity admits neither delay nor a formal mode of procedure. Each situation in which martial law is called into use differs in some particulars from all other occasions of its use. Consequently, it is hard to obtain a concise and stable definition of martial law, much less of the rules which govern its exercise. Nevertheless, some fundamental rules continue from year to year. From a careful study of the different instances in American history where martial law has been used, it is not impossible to deduce certain conclusions which make clear what martial law really is, when and where it can be exercised, and the extent of its powers.

Like many of our customs and laws, martial law had a long development in England before it was adopted and used in the United States. In the early history of England the term "martial law" originally meant the law administered by the Court of the Marshall and the Constable of England.[1] There are two theories as to the source of the term "martial": one explanation is that the term "martial law" was originally spelled "marshall law," meaning the law administered by the marshall or constable;[2] the other is that "martial" comes from the Latin word *martialis,* an adjective meaning "pertaining to

[1] W. S. Holdsworth, "Martial Law Historically Considered," *Law Quarterly Review,* XVIII (1902), 117.

[2] Sir Edward Coke, *The Fourth Part of the Institutes of the Laws of England,* p. 123. See Rudolph von Gneist, *The History of the English Constitution,* I, 266; Charles Fairman, *The Law of Martial Rule,* pp. 1-16.

war," and that martial law means the law of war.[3] The first source is probably the true one.

The Duke of Wellington once defined martial law as nothing more or less than the will of the general who commands the army and therefore, in fact, no law at all.[4] This definition has been most favored by military men because it means that from their position the relations with the civil population will be ideal—that is, the subordination of all civil law to the military. In American history one of the first instances of the use of martial law was that by General Jackson during and after the Battle of New Orleans. Jackson's use of martial law was bitterly assailed both by the courts and by statesmen, and resulted in a defense, in his behalf, equally as bitter and vehement. The whole affair has given us the first debates and conclusions respecting the use of martial law and the emergency power under the Constitution.

Martial law was not used to any great extent in America before this time.[5] During the Colonial period, its use was looked upon with high disfavor by both the Crown and the people,[6] and some of the instructions given to the governors placed restrictions upon its use. A part of the instructions to Lord Dunmore in 1771 was: "You shall not upon any occasion whatever establish or put into execution any articles of War or other Law Martial upon any of Our Subjects, Inhabitants of Our said Colony of Virginia, without the advice and consent of Our Council there."[7] Similar directions were given to other

[3] *Harper's Latin Dictionary,* ed., E. A. Andrews.

[4] Hansard's *Parliamentary Debates,* 3d Series, CXV (1851), 880.

[5] See the list of instances of the use of troops to quell riots and insurrection given by James Garfield in his argument before the Supreme Court in *The Milligan Case,* ed. Samuel Klaus, pp. 104-108.

[6] In South Carolina an act was passed in 1691 "For The Disabling of The Several Persons That Did Sett Up And Advise The Setting Up And Executing Martiall Law." It appears that martial law was used when there was no insurrection and when the courts were open. The men who put it into effect were punished by having their right to hold office taken away from them (*Statutes at Large of South Carolina,* ed. Thomas Cooper, II, 49-50).

[7] "Instructions to Lord Dunmore," *Massachusetts Historical Society Collection,* 4th Series, X, 661.

governors, and its use was prohibited as far as possible.[8] However, martial law was declared by General Gage in Boston in June, 1775,[9] and by Lord Dunmore in November, 1775.[10]

During the Burr Conspiracy, General Wilkinson had declared a semblance of martial law in New Orleans.[11] He had arrested some of the conspirators and held them in custody, awaiting their transportation to Washington. During the interval, writs of habeas corpus were issued, but were ignored by him. Wilkinson's conduct was upheld by investigation. Of this precedent Jackson at a later date did not fail to take account. However, no real conception of martial law and its use was obtained in America until General Andrew Jackson called it into service at the time of the Battle of New Orleans.

In order to understand the different conceptions of martial law that flowed from Jackson's use of his emergency power, it is necessary first to secure the facts of the case. The English, during the War of 1812, greatly desired New Orleans, since by controlling that town they could control the whole Mississippi Valley. The Middle West was starting its remarkable development, and people were just beginning to realize the importance of this rich, undeveloped land. The British hoped by gaining control of New Orleans, not only to strike a blow at the United States by capturing the backdoor of the country, but also to gain such a strong foothold in that territory that at the close of the war Britain would be able to retain Middle America.

When the danger of capture by the British became evident to the people of New Orleans, they became greatly excited, and confusion reigned supreme. The population was a motley group, composed to a great extent of French Creoles and slaves, and their loyalty to the government at Washington was of a doubtful quality, since they loved America not more, but

[8] Instructions to Bernard of North Carolina, Dudley of Massachusetts, and Dobbs of New Jersey. See also Leonard W. LaBaree, *Royal Government in America*, p. 107.

[9] Richard Frothingham, *History of the Siege of Boston*, p. 113.

[10] John W. Campbell, *History of Virginia from Its Discovery till the Year 1781*, p. 633.

[11] François X. Martin, *History of Louisiana*, chaps. xxvii and xxviii.

England less. Their attempts at defense were futile and proved to be of so little avail that their only salvation lay in outside aid from other sections of the United States. The help that reached New Orleans took the form of Tennessee and Kentucky troops under the leadership of General Jackson.

Although General Jackson was received by the citizens with the greatest of enthusiasm and rejoicing, he did not fail to perceive that his position was one of extreme peril. In the first place, he was short of men; secondly, he had to deal with a race different from the Tennesseans to whom he was accustomed; and thirdly, factions, particularly in the legislature, made co-operation difficult. Unity, however, was absolutely necessary to ward off the pending British attack, and the best method of securing unity, according to General Jackson, was through the use of martial law.

There were doubts among several of the citizens of New Orleans, especially members of the Louisiana legislature, as to the advisability of this step, a fact which later gave rise to the claim that Jackson had acted with his usual impetuosity. But the majority of the people, both at the time of the declaration and through the time of the actual conflict, until the news of peace reached them, thought it a wise and even necessary step. Parton, a biographer of Jackson, wrote:

> This important step was not the act of a moment, though the final decision to venture it was sudden. Nor does it appear to have been suggested by General Jackson. Before Jackson arrived, it was the general expectation among the leading men, that the coming of General Jackson and the proclamation of martial law would be events nearly simultaneous. The subject was daily talked of at head-quarters. The measure was recommended at a meeting of judges and members of the bar. The opinion was general among the American residents, that nothing short of the possession of absolute power would enable the General to wield the entire resources of the town, and direct them undiminished against the foe.[12]

[12] James Parton, *Life of Andrew Jackson*, II, 58-59. In a letter of General Jackson's to F. P. Blair, June 9, 1842 (*Niles' Weekly Register*, LXII, 326), General Jackson said that the measure had been talked over in committees, that it was the

During the continuance of the struggle little protest was raised against the administration of martial law by General Jackson because all energy was directed against the British for the protection of New Orleans. However, on January 8 the British were repulsed with great loss, and the event proved to be the end of the expedition against New Orleans. The British commander, having decided to withdraw, evacuated his camp and on January 19 re-embarked and put to sea.

Nevertheless, after the battle of January 8 Jackson continued to enforce the same regulations. When martial law was still rigorously maintained, the civil populace became dissatisfied. While things were beginning to take on a peace-time atmosphere, the enthusiasm and joy over the victory were replaced with a feeling that with hostilities at an end the citizens should not be bound by martial law. The measure, once deemed just because of necessity, now became tainted with despotism. The fleet had sailed away, another immediate invasion was not to be imagined, so why should they continue in this unnatural state?

The French population was particularly irked by the continuance of Jackson's rigid control over the populace and by his failure to disband the militia. In order to secure their release

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general conclusion that martial law was necessary, and he added, "Events, however, soon made it apparent that, without the declaration of martial law, the city could not be defended; and I took the responsibility upon myself of making the declaration in time to profit by the additional power it gave to the military arrangements for the defense."

The result of the proclamation, according to Parton, "was wholly, greatly, and immediately beneficial. The panic subsided. Confidence returned. Cheerfulness was restored. Faction was rendered powerless; treason, on any considerable scale, impossible. While the danger lasted, not a voice was raised against a measure which united the people as one man against the invaders of their soil. It was felt to be a measure that grew inevitably out of the necessities of the crisis, and one which alone was adequate to it" (*op. cit.*, II, 61).

Later in 1842 Jackson wrote to Lewis F. Linn: "When I declared martial law, judge Hall was in the city, visitted [*sic*] me often where the necessity of declaring martial law was discussed and recommended by all the patriotic and leading men in the city, and by his actions appeared to approve it. The morning I issued the order he visitted [*sic*] me at my office, the order was read aloud, when he heard it he exclaimed, now the country may be saved, without it, it was lost" (letter to L. F. Linn, March 12, 1842, John S. Bassett, *Correspondence of Andrew Jackson*, VI, 144. Hereinafter referred to as *Correspondence*).

from the militia, many individuals of French descent secured a statement from the French consul that they were French citizens. When a considerable number had used this method of escape from military service, Jackson declared the existence of a conspiracy and issued a proclamation ordering all French citizens in New Orleans to leave the city and not to remain any nearer than Baton Rouge.[13]

General Jackson, in a letter to the Secretary of War, made clear his position: "I believe you will not think me too sanguine in the belief that Louisiana is now clear of its enemy. I hope, however, I need not assure you that wherever I command such a belief shall never occasion any relaxation in the measures of resistance. I am but too sensible that the moment when the enemy is opposing us is not the most proper to provide for them."[14] He also issued a proclamation[15] giving the people the reasons why he was unable to restore civil law, but the people still remained dissatisfied. Bassett commented upon these actions thus:

In these things Jackson showed his worst side. If he had possessed ordinary tact he would have found some quiet way out of the situation before him. . . . It was a situation that did not demand the inflexibility displayed by Jackson. As to martial law, he was justified in establishing it, but only as an emergency measure. It was unwise to prolong it when the country was past the crisis, and it is not unfair to suppose that his conduct in that respect was due not so much to a sense of necessity as to his innate desire to be obeyed.[16]

The breaking point was reached when an article appeared in the *Louisiana Courier* written by Louaillier condemning Jackson's use of martial law. Louaillier wrote:

Let us conclude by saying, that it is high time the laws should resume their empire; that the citizens of this state should return

[13] *Correspondence,* II, 181.

[14] A letter of Jackson to the Secretary of War (Parton, *op. cit.,* II, 300).

[15] Jackson stated: "We must not be thrown into false security by hopes that may be delusive. . . . To place you off your guard and attack you by surprise, is the natural expedient of one who, having experienced the superiority of your arms, still hopes to overcome you by stratagem" (*Niles' Weekly Register,* VIII, 70).

[16] *Correspondence,* II, ix.

to the full enjoyment of their rights; that in acknowledging, that we are indebted to general Jackson for the preservation of our city, and the defeat of the British, we do not feel much inclined, through gratitude, to sacrifice any of our privileges, and less than any other, that of expressing our opinion about the acts of his administration; that it is time the citizens accused of any crime should be rendered to their natural judges, and cease to be dealt with before special or military tribunals, a kind of institution held in abhorrence even in absolute governments; and that having done enough for glory, the moment of moderation has arrived; and finally, that the acts of authority which the invasion of our country, and our safety may have rendered necessary, are, since the evacuation of it by the enemy, no longer compatible with our dignity and our oath of making the constitution respected.[17]

The editor of the newspaper was summoned, and on giving the name of the author of the article, he was dismissed. Then Louaillier was immediately arrested by Jackson's soldiers and placed in confinement. Louaillier's lawyer applied to Dominick A. Hall, Judge of the District Court of the United States, for a writ of habeas corpus. Judge Hall granted the writ, and Louaillier's counsel demanded that Jackson give up his illegally arrested person and turn him over to the civil courts. Jackson replied by issuing the following order: "Having recd information that Domanic A. Hall has been engaged in a[i]ding abetting and exciting mutiny within my camp, You will forthwith order from your Regt a detachment to arrest and [confine] him, and make report of the same to head Quarters. . . . The agents of the enemy amongst us are more numerous than was first expected."[18]

Jackson was probably carrying his authority to too great a length; Judge Hall was not guilty of the crimes attributed to him, although he might not have been in accord with General Jackson's policies. Just at this time, however, news arrived from Washington that peace had been declared, but the messenger by mistake brought another dispatch.[19] Andrew

[17] Martin, *op. cit.*, p. 393.

[18] *Correspondence*, II, 183.

[19] The messenger had an order to all postmasters to give him aid along the route, for "the bearer hereof, is charged with dispatches relative to the state of

Jackson now undoubtedly knew that peace had been declared, but he maintained his position till he had the official news in his hands. The court-martial of Louaillier was continued, but he was discharged. Since Jackson did not agree with the verdict, he put Louaillier back in prison. Judge Hall was not tried, but he was transported beyond the city, with orders not to return until the enemy had departed or peace had been declared.[20] When on March 13 Jackson at last received official news that peace had been declared, he immediately released all prisoners and revoked martial law. All the "Frenchmen" and Judge Hall returned to the city, and the latter, who has been described by Martin as a magistrate of "pure heart, clean hands, and a mind susceptible of no fear, but that of God,"[21] and by Jackson as a scoundrel and a sorehead, undertook to have General Jackson punished for contempt of court.[22]

It was ruled in the court that General Jackson should show cause "why an attachment should not be awarded against him

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peace which has taken place between the United States and Great Britain" (*Niles' Weekly Register,* VIII, 122).

[20] Jackson's order to D. A. Hall, New Orleans, March 11, 1815: "Sir, I have thought proper to send you beyond the limits of my encampment, to prevent you from a repetition of the improper conduct for which you have been Arrested and Confined; And to order that you remain beyond my chain of centinels, untill [*sic*] it is announced by proper authority that the ratification of the treaty between Great Britain and the U. States, has been made, or the enemy shall have left the Southern coast. The limits of my encampment are discribed [*sic*] by the lines of Genl. Carroll, four miles above the city, the Lakes in the rear of the City, And the lines of the 7th Infantry four miles below the Same" (*Correspondence,* II, 189-190).

[21] Martin, *op. cit.,* p. 405.

[22] Soon after the conclusion of these events reconciliation took place between Hall and Jackson, for in a letter written in September, 1816, Jackson said: "It is the first wish of my heart to be in friendship with all good men. It being the wish of some of my friends that I should meet Judge Hall in friendship, their wishes I could not forego. When he offered me his hand I received it and in the gratification of my friends on this occasion my mind receives its reward and tells me I have done right. I have in some measure added peace to his bosom, tranquility to my own and restored him to the social circle of his former friends and acquaintances. On my part the hatchet is buried in oblivion and from what you say of him I have no doubt it is so on his part" (*Correspondence,* II, 259).

The hatchet must not have been buried very deeply, for later in life Jackson referred to Hall as a "vindictive and corrupt Judge." A man who "acted throughout, from motives of personal resentment, and not from a sense of official dignity . . . he had neither elevation of character or a spark of American feeling in his bosom" (*Correspondence,* VI, 258, 215).

for contempt of this court, in having disrespectfully wrested from the clerk aforesaid an original order of the honorable the judge of the court . . . also for disregarding the said writ of habeas corpus, when issued and served; in having imprisoned the honorable the judge of this court; and for other contempts, . . . as stated by the witnesses."[23] *Niles' Weekly Register,* hearing of General Jackson's predicament, stated: "How far the proceedings, on either side, were correct, we do not pretend to determine, but heaven preserve the reputation of that man who incurs the hatred of the *lawyers* and the *printers.*"[24]

The defense of General Jackson rested on the ground that all of his actions were taken under necessity in the prosecution of martial law and were therefore justified.[25] The Judge failed to sustain the plea, and Jackson was fined one thousand dollars for contempt of court, which he immediately paid by check. The ladies of New Orleans offered to pay the fine, but Jackson refused.[26] After the decision of the court the General made the following statement:

> I have during the invasion exerted every one of my faculties for the defense and preservation of the constitution and laws. On this day I have been called on to submit to their operation under circumstances which many persons might have thought sufficient to justify resistance. Considering obedience to the laws, even when we think them unjustly applied, as the first duty of the citizen, I did not hesitate to comply with the sentence you have heard, and I entreat you to remember the example I have given you of respectful submission to the administration of justice.[27]

In his defense before Judge Hall, in his proclamations to the troops and citizens respecting the whole situation, and in his letters Jackson has given his conception of martial law, when it is to be declared, its manner of execution, and the liability of the persons who use it. His is really the first American conception of martial law, but it smacks strongly of the

[23] Parton, *op. cit.,* II, 317.

[24] *Niles' Weekly Register,* VIII, 145.

[25] This defense was written by Edward Livingston.

[26] See account in Thomas H. Benton, *Thirty Years' View,* II, 499.

[27] Speech in Coffee Exchange House just after the sentence. (John S. Bassett, *Life of Andrew Jackson,* I, 230; see also *Niles' Weekly Register,* VIII, 246).

Europe of the Napoleonic era. Martial law, according to General Jackson, is the will of the commander who must be obeyed by all for the simple reason that to him is entrusted the safety of the people, and also for the reason that he is the person best able to know what actions are necessary. Jackson, a little uncertain as to the constitutional basis for the declaration of martial law, asked the opinions of Edward Livingston and Abner Duncan, both able lawyers, as to the authority for his action. Livingston replied that a proclamation of martial law was unknown either to the Constitution or to the laws of the United States and that the officer did it at his own risk and only when such drastic action was absolutely necessary. If the civil courts should decide that the military commander used his power in an improper manner, Livingston thought that the government should indemnify him.[28] Duncan, on the other hand, justified the use of martial law on constitutional grounds: ". . . The constitution of the United States secures to the citizen the more valuable privileges, yet the same constitution contemplates the necessity of suspending the operation of some in order to secure the continuance of all." The authorization of the suspension of the writ of habeas corpus, according to Duncan,[29] indirectly implied the operation of martial law. In his General Order of March 14, 1815, Jackson said:

> The constitution of the United States secures to the citizens the most valuable privileges, yet the same constitution contemplates the necessity of suspending the exercise of some in order to secure the continuance of all. If it authorizes the suspension of the habeas corpus in certain cases, it thereby impliedly admits the operation of martial law, when, in the event of rebellion or invasion, the public safety may require it. To whom does the declaration of this law belong? To the guardian of the public safety—to him who is to conduct the operations against the enemy, whose vigilance is to decry danger, and whose arms are to repel it.[30]

[28] *Correspondence,* II, 197-198.
[29] *Ibid.,* pp. 198-199.
[30] *Niles' National Register,* LXIV, 62.

Jackson, therefore, believed that his use of martial law was justified by a necessity and that its use was not unconstitutional since the Constitution itself provided for the suspension of the writ of habeas corpus and thereby implied that the use of martial law might become necessary under the Constitution. It must be admitted that at first Jackson himself doubted that there was any constitutional authority for his action, and he is reported to have publicly stated that he had violated the Constitution.[31] He abandoned this position, however, and on many later occasions and at the time of the refunding of his fine by Congress he justified his action by the Constitution. Few people at that time agreed with his position; many of Jackson's own friends believed that his actions in reality supplanted the Constitution. President Monroe evidently took this point of view, for Secretary of War Dallas stated that the President's opinion was:

> In the United States there exists no authority to declare and impose Martial law, beyond the positive sanction of the Acts of Congress. . . . If, therefore, he (a military commander) undertake to suspend the writ of Habeas Corpus, to restrain the liberty of the Press, to inflict military punishments, upon citizens who are not military men, and generally to supersede the functions of the civil Magistrate, he may be justified by the law of necessity, while he has the merit of saving his country, but he cannot resort to the established law of the land, for the means of vindication.[32]

The extent of martial law included all persons, whether citizens or soldiers, who were within the territory covered by the proclamation. General Jackson did not have any occasion to arrest any person outside these limits. There is very little doubt but that he would have so acted if he had thought it necessary. His official statement was:

> Martial law being established, applies, as the commanding general believes, to all persons who remain within the sphere of its operation; and claims exclusive jurisdiction of all offenses, which aim at the disorganization and ruin of the army over which

[31] Charles Gayarré, *History of Louisiana*, IV, 615.

[32] Secretary Dallas to Jackson (*Correspondence*, II, 212-213).

it extends. To a certain extent, it is believed to make every man a *soldier,* to defend the spot where chance or choice has placed him, and to make him *liable* for any misconduct calculated to weaken its defense.

If martial law, when necessity shall have justified a resort to it, does not operate to this extent, it is not easy to perceive the reason or the utility of it. . . . Why is martial law ever declared? Is it to make the enlisted or drafted soldier subject to it? He was subject to it before. It is, that the whole resources of a country, or of that district over which it is proclaimed, may be successfully applied for its preservation. Every man, therefore, within the limits to which it extends, is subject to its influence. If it has not this operation, it is surely a perfect nullity.[33]

The only restriction that Jackson thought could be applied to his use of martial law was necessity, but even then the military commander himself was the person who decided on the advisability of martial law and the extent of the measures used in the execution of it. It was reported that, in summary, his defense was:

In this crisis, and under a firm persuasion that none of these objects could be effected by the exercise of the ordinary powers confided to him: under a solemn conviction that the country committed to his care could be saved by that measure only from utter ruin—under a religious belief that he was performing the most important and sacred duty, the respondent proclaimed martial law. He intended by that measure to supersede such civil powers as in their operation interfered with those he was obliged to exercise. He thought that in such a moment, constitutional forms must be suspended for the permanent preservation of constitutional rights, and that there could be no question whether it were better to depart for a moment, from the exercise of our dearest privileges, or have them *wrested* from us forever. He knew that if the civil magistrate were permitted to exercise his usual functions, none of the measures necessary to avert the awful fate that threatened us, could have been effected. . . . To have suffered the uncontrouled enjoyment of any one of these rights, during the time of the late invasion, would have been to abandon the defense of the country:

[33] Proclamation of Jackson after the court-martial of Louaillier (Martin, *op. cit.,* p. 402).

the civil magistrate is the guardian of those rights, and the proclamation of martial law was therefore intended to supersede the exercise of his authority, so far as it interfered with the necessary restriction of those rights, *but no farther*.[34]

Such was Jackson's plea before the court in his trial, but the court failed to agree with him. It appears, therefore, that while General Jackson was omnipotent in time of war, yet when peace was declared and the courts again opened their doors, he could be held accountable for his actions—in so far as they affected the court, undoubtedly, and impliedly in all other actions; that is, a commander is the judge of the necessity, but he must act in good faith. In the case of General Jackson his contempt of court was considered as a purely malicious act.

During the controversy Jackson was supported by his Tennessee and Kentucky troops and also by a great number of Louisiana citizens. To most people, even at that time, his actions as a whole seemed justifiable, and certainly the end justified the means. When the news of peace was received, the Louisiana troops sent the following message to General Jackson:

> We pray you to receive the sincere tribute of our thanks as soldiers . . . for the wisdom of the measures you have devised to protect our country. . . . Leaving to others the task of declaiming about *privileges* and constitutional rights, we are content in having fought in support of them—we have understanding enough to know when they are wantonly violated; and no false reasoning shall make us ungrateful to the man whose wisdom and valor has secured them to us and our posterity.[35]

When news of General Jackson's conduct reached Washington, Secretary of War Dallas wrote to him:

> I assure you, sir, that it is a very painful task to disturb, for a moment, the enjoyment of the honorable gratification which you must derive, as well from the consciousness of the great services that you have rendered to your country, as from the expressions

[34] Defense of General Jackson in his trial for contempt of court (*Niles' Weekly Register*, VIII, 250).

[35] Address by City Troops to General Jackson, March 16, 1815 (*op. cit.*, p. 142).

of approbation and applause, which the nation has bestowed upon those services. But representations have been recently made to the President, respecting certain acts of military opposition to the civil magistrate, that require immediate attention, not only in vindication of the just authority of the laws, but to rescue your own conduct from all unmerited reproach. . . .

From these representations it would appear that the Judicial power of the united states has been resisted, the liberty of the press has been suspended, and the Consul and subjects of a friendly Government have been exposed to great inconvenience, by the exercise of Military force and command. The President views the subject, in its present aspect, with surprise and solicitude; but in the absence of all information from yourself, relative to your conduct and the motives for your conduct, he abstains from any decision. . . . He instructs me, therefore, to request, that you will, with all possible dispatch, transmit to this Department a full report of the transactions which have been stated. And, in the meantime, it is presumed, that every extraordinary exertion of military authority has ceased, in consequence of the cessation of all danger, open or covert, upon the restoration of peace.[36]

Upon sending the facts of the case to Washington, Jackson received the following reply from Secretary Dallas:

The President has seen with satisfaction, Sir, that your justification of the measures, particularly contemplated, rests exclusively upon the ground of "a necessity, not doubtful, but apparent from the circumstances of the case"; and that when you call them "measures of necessity," you mean measures, "without which the country must have been conquered, and the Constitution lost." The position thus taken is candid and explicit: just, as it respects your own responsibility; and safe, as it respects the liberties of the nation. . . . Exigencies may sometimes arise, when (as you have emphatically observed) "constitutional forms must be suspended, for the permanent preservation of constitutional rights." If, therefore, a crisis of that nature existed at New-Orleans, the President could feel no disposition to condemn the measures, that were adopted as indispensable, to rescue the Country, from impending danger; nor does he even deem it material, at this time,

[36] Letter of Secretary Dallas to General Jackson, April 12, 1815 (*Correspondence*, II, 203-204).

to enter into a critical examination of the evidence, which is adduced to prove the existence of the crisis.[37]

Shortly after the use of martial law in New Orleans, a case arose in the Louisiana courts[38] in which the judges were forced to decide whether Jackson's declaration and use of martial law was lawful. Two separate decisions were given, and both judges agreed that it was usurpation of power, because it interfered with the courts. This interference was a legislative power only, and General Jackson's actions were, therefore, contrary to law.

Judge Martin claimed: "The proclamation of martial law, if intended to suspend the functions of this Court or its members, is an attempt to exercise powers thus exclusively vested in the legislature. I therefore cannot hesitate in saying, that it is in this respect null and void."[39] Judge Derbigny likewise maintained: "It is, therefore, our opinion, that the authority of courts of justice has not been suspended *of right*, by the proclamation of the *martial law*, nor by the declaration of the general of the seventh military district that the city of New Orleans was a camp; and we now repeat what we declared when the subject was discussed, 'that the powers vested in us by law can be suspended by none but legislative authority.' "[40]

The use of martial law by Jackson was considered unlawful by the Louisiana legal authorities and by many others. It was not until twenty-seven years later that a movement was started which was in direct contradiction to the foregoing opinions and which justified the position of Jackson and his friends. Then Congress returned the fine, with interest, at the same time upholding his use of martial law.

THE REFUNDING OF THE FINE

Two episodes in Jackson's career caused him more chagrin than any others. He could not stand censure, and both Judge Hall's censure and that of the Senate concerning "removal of deposits" were intolerable to him. His friends, knowing his

[37] Secretary Dallas to Jackson (*ibid.*, p. 212).
[38] *Johnson* v. *Duncan*, 3 Martin (La.) 530 (1815).
[39] *Ibid.*, p. 533.
[40] *Ibid.*, pp. 552-553.

feelings upon these matters, had both removed. In the case of the fine imposed by Judge Hall, Congress in 1844, after a debate that lasted intermittently for several years, voted to have the fine repaid with interest. Jackson at that time badly needed money, but it was not so much the money as the principle that was at stake. The repayment did not take place until after his retirement from the Presidency. The affair at New Orleans was never forgotten, nor was Judge Hall forgiven, by Jackson.

At the time of the introduction of the bill in Congress General Jackson wrote to L. F. Linn a letter which was read in the Senate:

> It is not the amount of the fine that is important to me: but it is the fact that it was imposed for reasons which were not well founded; and for the exercise of an authority which was necessary to the successful defense of New Orleans; and without which, it must now be obvious to all the world, the British would have been in possession, at the close of the war, of that great emporium of the west. In this point of view, it seems to me that the country is interested in the passage of the bill; for exigencies like these which existed at New Orleans may again arise; and a commanding general ought not to be deterred from taking the necessary responsibility by the reflection that it is in the power of a vindictive judge to impair his private fortune, and place a stain upon his character which cannot be removed. I would be the last man on earth to do any act which would invalidate the principle that the military should always be subject to the civil power; but I contend that at New Orleans no measure was taken by me which was at war with this principle, or which, if properly understood, was not necessary to preserve it.[41]

Thomas Benton said:

> The refunding of the fine in the sense of a pecuniary retribution, was altogether refused and repulsed both by General Jackson and his friends. He would only have it upon the ground of an illegal exaction—as a wrongful exercise of authority—and as operating a declaration that, in declaring martial law, and imprisoning

[41] Letter from Jackson to Hon. L. F. Linn, March 14, 1842 (*Niles' National Register*, LXII, 212).

the citizens under it, and in refusing to produce his body upon a writ of *habeas corpus*, and sending the judge himself out of the city, he was justified by the laws of the land in all that he did.[42]

Later events showed that Congress had been willing to refund the money, but it had hotly debated the question of the legality of Jackson's conduct.

The bill, introduced in the Senate by Linn on March 10, 1842, did not pass for two years. The events connected with Jackson's use of martial law were reviewed time after time. Pamphlets appeared,[43] newspapers carried articles on both sides of the question, and debate took place both inside and outside of Congress. Information was gathered from Louisiana, from General Jackson, and from any other possible source. At one time during the debate certain individuals practiced the old schoolboy trick of withholding material from the library so that it might not be available to the opposition.[44]

The following objections were raised: first, it was a defamation upon the character of Judge Hall; secondly, it substantiated General Jackson's idea of martial law and would set precedent for all further instances when martial law became necessary; and thirdly, the bare facts of the case showed that Jackson had acted unnecessarily and in an unconstitutional manner. His friends answered these arguments by saying that all Jackson's actions were necessary and that the refund was due to him regardless of whether it made precedent or not.[45] But if it did, it would be a good precedent. In the debate the opposition claimed that to pass the act remitting the fine was tantamount to taking the hero of New Orleans back "to the scene of his

[42] Benton, *op. cit.*, II, 500.

[43] The two most famous pamphlets were: in favor of repayment, Charles J. Ingersoll, *General Jackson's Fine: An Examination of the Question of Martial Law;* against repayment, "Martial Law by a Kentuckian," *Louisville Journal,* 1842.

[44] Francis P. Blair, in his letter to Jackson, stated that replies to certain attacks on Jackson would already have appeared except that certain leaders of the opposition "have gotten Martin's *History* out of the Library and although applied to for it, by Mr. Ingersol, yet withhold it, under the pretext that they are copying extracts from it. If they do not give it up in a day or two I will attack them for their mean device to save themselves and the authority on which they rely from public exposure" (*Correspondence,* VI, 160).

[45] For the debate of the question, see *Congressional Globe,* XI, XII, XIII.

military glory, with all Congress at his heels, and sanction, by an official act of national legislation, an outrage on the Constitution and the laws of the country."[46] And Senator Bayard of Delaware maintained that General Jackson had no power to declare martial law, nor did Congress have this power, for by the Constitution the power was not given to either. Congress has only the power to suspend the privilege of the writ of habeas corpus, and this power can only be used in times of rebellion or invasion. Therefore, Bayard claimed that refunding the fine would be tantamount to the substantiation by Congress of an unlawful act.[47]

James Buchanan, answering this argument, protested:

We did not contend, strictly speaking, that General Jackson had any constitutional right to declare martial law at New Orleans; but that, as this exercise of power was the only means of saving the city from capture by the enemy, he stood amply justified before his country for the act. We placed the argument not on the ground of strict constitutional right, but of such an overruling necessity as left General Jackson no alternative between the establishment of martial law, or the sacrifice of New Orleans to the rapine and lust of the British soldiery.[48]

R. J. Walker, making a report on the bill, said that General Jackson's act in arresting Judge Hall

. . . was not merely excusable, but justifiable. It was demanded by a great and overruling necessity; and had he failed to assume this responsibility, and the consequences which he anticipated had occurred, he would have merited and received universal execration. . . . The law which justified the act, was the great law of necessity; it was the law of self-defense. This great law of necessity —of defense of self, of home, and of country—never was designed to be abrogated by any statute, or by any constitution. This was the law which justified the arrest and detention of the prisoner; and, however the act may now be assailed, it has long since received the cordial approbation of the American people.[49]

[46] Speech of Senator Miller (*Congressional Globe,* XII, 301).

[47] Speech of Senator Bayard (*ibid.,* Appendix, pp. 67-68).

[48] Thomas H. Benton, *Abridgement of the Debates of Congress from 1789 to 1856* (hereinafter cited as *Abridgement*), XIV, 628.

[49] Minority Report on Fine, *Congressional Globe,* XII, 141.

In the House the debate was just as hotly maintained as in the Senate. It was called both a party and a political measure, for the opponents of the bill could see no other justification. The bill, however, was passed with very little difficulty. The main objection here also was its alleged unconstitutionality. Barnard of New York held that "Congress itself could not proclaim martial law. It might suspend the habeas corpus act, but it could not suspend the Constitution. A proclamation of martial law by the Congress of the United States would, of itself, be a violation of the Constitution."[50]

Probably the most eloquent speech in favor of refunding the fine was delivered by Stephen A. Douglas, and undoubtedly it had great weight upon the final result. Douglas, still more or less an unknown quantity in the House, by his speech called forth much admiration. Even John Quincy Adams was willing to admit that it was "an eloquent, sophistical speech, prodigiously admired by the slave Democracy of the House."[51] His speech was a refutation of Barnard's, which was the one just preceding his. Barnard justified punishment for contempt as a power belonging to the courts. It was a good opening for Douglas; so he grasped it immediately, saying:

> He was not one to admit that General Jackson violated the Constitution, or the law, at New Orleans. He denied that he violated either. He insisted that the general rightfully performed every act that his duty required, and that his right to declare martial law, and enforce it, resulted from the same source, and rested on the same principle, that the gentleman from New York (Mr. Barnard) asserted, from which Judge Hall derived the authority to punish for contempt, without trial, without witnesses, without jury, and without anything but his own arbitrary will. The gentleman asserted that the power to punish for contempt was not conferred by the statute, or by the common law, but was inherent in every judicial tribunal and legislative body; and he cited the authority of the Supreme Court to support the assertion. He said that this power was necessary to the courts, to enable them to perform the duties which the laws entrusted to

[50] Speech of Barnard of New York (*ibid.*, XIII, 92).

[51] John Q. Adams, *Memoirs of John Quincy Adams*, XI, 478.

them, and arose from the necessity of the case. Now, it was from the same source that the power to declare martial law was derived —its necessity in time of war for the defense of the country. The defense of the lives and liberties of the people, as well as their property, being all entrusted to the discretion of the commanding general, it became his duty to declare martial law, if the necessity of the case required it. . . . The Constitution was adopted for the protection of the country; and under that Constitution, the nation had the right to exercise all the powers that were necessary to the protection of the country. If martial law was necessary for the salvation of the country, martial law was legal for that purpose.[52]

From this brief account of the debate it can be seen that there was great difference of opinion among the Senators and Representatives concerning martial law and its powers with respect to the Constitution. It was generally agreed, as is shown by the passage of the bill, that in the absence of a decision by the Supreme Court regarding the use of martial law, the refunding of the fine was substantiating a constitutional action.

A great amount of pressure was brought to bear upon members of Congress to refund the fine. Letters were sent to Washington; memorials and resolutions were adopted all over the United States favoring such action. From Nashville Jackson kept in close touch with the situation, and his letters to Blair and Linn show how deeply he was concerned with the final action of Congress. He firmly believed that any person who studied the facts connected with his use of martial law would not doubt that it was used properly and that most of the opposition came from certain Whigs who were eager to oppose anything that might benefit him. He cautioned Amos Kendall, then in Washington, "Have no reliance on any Whigg [*sic*]; they will oppress you if they can," and he bitterly denounced Clay and his "Charlies" for engendering this opposition.[53]

Even though many Whigs opposed repayment of the fine, Jackson had the support of many prominent individuals. From

[52] Speech of Stephen A. Douglas, in House, Jan. 10, 1844 (*Congressional Globe*, XIII, 113).

[53] *Correspondence*, VI, 159, 208.

Texas Sam Houston wrote to Jackson giving his support.[54] Chief Justice Taney, loyal to his old friend, expressed his hope that the fine would be refunded as a vindication.[55] President Tyler in his message to Congress in December, 1842, said: "I recommend to Congress to take into consideration the propriety of reimbursing a fine imposed on General Jackson, at New Orleans. . . . Without designing any reflection on the judicial tribunal which imposed the fine, the remission at this day may be regarded as not unjust or inexpedient."[56]

No doubt public opinion was strongly in favor of refunding the fine. As evidence of this fact, a resolution limiting the debate on the measure was passed the day before the final vote was taken, which had the following preamble:

> WHEREAS the Legislature of eighteen States of this Union, containing, at the last census, about fifteen millions out of the seventeen millions of the inhabitants of the United States, have instructed their Senators, and requested their Representatives, to refund the fine imposed upon General Jackson by Judge Hall.
>
> AND WHEREAS a strong expression of public opinion has been made in favor of the same measure in the remaining States of the Union: therefore, *Resolved,* . . . all debate . . . shall cease. . . .[57]

To confirm the fact that the measure was taken after consideration and with a clear understanding of the precedent it would set, substitute acts were brought forward and amendments were proposed to the original bill, but none were adopted.[58] One amendment to the effect that no slur was intended upon Judge Hall, failed to pass. Another bill was brought forward providing that the fine be paid for the *relief* of General Jackson, but it met a like fate.[59] This action of Congress was a substantiation of Jackson's conduct at New Orleans, and therefore a sanction of his use of martial law. Whether the bill passed because it was a courtesy to a former President, because of the number of friends Jackson had in

[54] *Ibid.*, pp. 187-190.
[55] *Ibid.*, pp. 216-217.
[56] Message to Congress, Dec., 1842 (*Congressional Globe,* XII, Appendix, p. 32).
[57] *Abridgement,* XV, 53.
[58] *Congressional Globe,* XI, 514; XIII, 206.
[59] *Abridgement,* XIV, 705.

both Houses, or because of the fact that nearly all the American people at that time desired the act, it is impossible to say. Probably all had something to do with it. Nevertheless, such action was taken, and while it was indeed a tribute to Jackson's power and remarkable personality, it was also a substantiation of his use of martial law.

What then are the main characteristics of Jacksonian martial law? In the first place, one must remember that it is martial law in time of invasion and not in time of civil disturbances. It is the use of martial law within a war area. It is in a territory of military operations, and the great distinguishing point between this case and *Ex parte Milligan*[60] is that of location—one is within a war zone, while the other is without. According to the Jacksonian idea, when martial law is within a theater of war operations, the military commander is supreme. His power extends over citizens and soldiers alike, and it extends as far as the proclamation or even farther if necessity demands. The military commander is really an omnipotent being.

By the Jacksonian concept martial law, when absolutely necessary and when confined to a war area, is not extraconstitutional. It is true that there was great divergence of view upon this point both at the time of the use of martial law at New Orleans and during the debates in Congress over refunding. However, the repayment of the fine, coming many years later and with the facts of the case known to all, justified Jackson's contention that he had a legal basis for his action.

Another point that may be deduced from this occasion is that martial law means the suspension of the writ of habeas corpus. Jackson was perfectly willing to let the civil courts continue so long as they did not interfere with his military operations. They must hold a secondary position. The commander during this period had the power to institute courts-martial and to try both civilians and soldiers, but no civil court could issue a writ of habeas corpus and have the prisoner transferred to the civil courts. Nothing must interfere with the operations against the enemy, and, according to General

[60] 4 Wall. 2 (1866).

Jackson, if the writ of habeas corpus were not suspended, "the enemy may conquer your country, by only employing lawyers to defend your constitution."[61]

It is true that Jackson himself acquiesced in a wide review of his action upon the restoration of the civil authority, and he did not doubt the power of the court to punish for contempt of court or to review his actions which were committed during the actual period of martial law. Jackson's use of martial law was justified, and the court's action was rejected because the facts of the case did not justify the court's actions. In other words, unnecessary interference by the courts, even though it followed after the reign of martial law had come to an end, was looked upon with great disfavor.

Lastly, notwithstanding the decision of the Louisiana court in the case of *Johnson* v. *Duncan* and the action of the District Court in placing a fine upon General Jackson, Congress, in refunding the fine, substantiated General Jackson's interpretation of martial law and its use. The people, as a whole, were behind the action of Congress, for the passage of the bill was received with great satisfaction. It may be said, therefore, that Jackson's use of martial law was upheld by Congress and the people and that a precedent was created calculated to influence all subsequent use of martial law.

[61] *Niles' Weekly Register*, VIII, 143.

Chapter II

MARTIAL LAW IN RHODE ISLAND IN 1842

THOMAS JEFFERSON, advocating separation from England by the revolutionary method, claimed that in order for the people of a nation to be free there should be a revolution every nineteen years. This statement, which has alarmed many, makes clear the important fact that governments must change with the times and must meet new conditions; otherwise there will be revolution. In Rhode Island in 1842 there was a state government that failed to recognize this important fact, and, as a consequence, there occurred Dorr's Rebellion. The facts of this occurrence[1] are well known and may be stated briefly.

At the time of the American Revolution, when all the other states were framing and adopting new constitutions, Rhode Island and Connecticut failed to do so. Rhode Island continued the form of government established by the charter of Charles II and made alterations only when it was necessary to make it conform to the idea of a free state within the United States. There were two main objections to this constitution. First, the right to vote was allowed only to "freeholders," that is, owners of real estate to the value of one hundred and thirty-four dollars. During the Revolution nearly all men owned at least that much real estate, but, when the manufacturing era dawned, many taxpaying citizens were disqualified from voting. The second change demanded was a correction in the apportionment of representatives. When Rhode Island became a state, Newport was its largest city and therefore had more members in the general assembly. While the apportionment

[1] See *Almond Danforth Hodges and His Neighbors;* Jacob Frieze, *A Concise History of the Efforts to Obtain an Extension of Suffrage in Rhode Island;* Mrs. Francis H. G. McDougall, *Might and Right;* Arthur M. Mowry, "The Constitutional Controversy in Rhode Island in 1841," *Annual Report of American Historical Association,* 1894, pp. 361-370; *Niles' National Register,* LXII, LXIII; *Luther* v. *Borden,* 7 Howard 1 (1848); Reports of Committees, 28th Cong., 1st sess., No. 546; Executive Documents, 28th Cong., 1st sess., Nos. 136, 152, 225, 232, 233.

remained constant, Providence, Pawtucket, and other manufacturing towns had a rapid growth and the representative system became very unequal. Indeed, the situation was very similar to that in England before the Reform Bill of 1832, and not improbably Rhode Island was affected by the reform movement in England.[2]

The agitation for reform finally attained such dimensions that the assembly voted to call a convention to amend the charter or to form a new constitution. The Suffrage or People's party, which was the radical party in Rhode Island, was not satisfied with this action; consequently, they called a convention of their own to meet in November, 1841, to form a new constitution. As a result, two distinct conventions met in the same month for the same purpose. The Convention of the General Assembly met only to adjourn until February. The People's Convention, however, framed a constitution and put it up to the vote of the people; since every male over the age of twenty-one voted, it received the total vote of over one-half the male population of the state. With this proof of a majority the party claimed that "a majority of the citizens of any State have the incontrovertible right, at any time, to assemble and alter, amend, annul or reform their government at pleasure."[3]

The Convention of the General Assembly met in February and adopted a constitution not very different from that of the Suffrage party. This constitution was put to a vote, but since all Suffragists wanted their constitution or none, the measure was defeated.

Each party claimed to have a legal government and proceeded to put its officers in power. Conflicts later developed into open warfare, and intense excitement prevailed. The struggle for power soon came to an end, for the old government, from the very beginning, controlled the situation. The rebellion collapsed, and many of the rebels were tried for treason. In fact, the whole controversy was settled by the fall of 1842. The Rhode Island government, however, realized the necessity of a new constitution, and in the same year a new one was

[2] Mowry, *op. cit.*, p. 363. [3] *Ibid.*, p. 365.

adopted. This document was put into force in 1843, and proved to be very acceptable to all the citizens.

In the midst of the rebellion, when actual warfare seemed inevitable, the assembly of Rhode Island on June 25, 1842, passed the following measure:

> An Act establishing martial law in this State. Be it enacted by the General Assembly as follows: Sec. 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of his excellency the governor of the State.[4]

The next day the Governor issued a proclamation carrying the act into effect, and it continued in force as long as was necessary. On September 1 its use was suspended indefinitely by the Governor.

The most interesting episode under this regime of martial law is that which gave rise to the case of *Luther* v. *Borden*, the first case in which the Supreme Court of the United States laid down any rule concerning its use. It is really the foundation of the many instances of the use of martial law by the different states that have taken place since that date.

The facts of the case are as follows: An action of trespass was brought against Borden by Luther for breaking into his home. Borden claimed Luther was in open rebellion against the state and that he himself was a representative of the state government and had entered the house only in the discharge of his duty while putting down the rebellion. Luther, however, asserted that he had represented the true government. The basic question of the case became, which was the true government of Rhode Island? While martial law was not the main question at issue, yet it played an important part in the decision, and some very important points were settled by the Supreme Court.

One of the arguments of the plaintiff was that a state had no right to declare martial law. Unfortunately, the attorney's

[4] *Report of Committees*, 28th Cong., 1st sess., Vol. III, Report No. 546, p. 373.

brief has been lost; but from the facts of the case it would appear that the dissenting opinion of Justice Woodbury contained, to a large extent, the argument developed by plaintiff's counsel. The dissenting opinion of Justice Woodbury is not only very interesting but also very important since in it is summed up all the arguments that may be brought against the use of martial law by a state.

Justice Woodbury stated that he did not believe the statute establishing martial law over the whole state to be constitutional. Where, he asked, did Rhode Island get this conception of martial law? He could see no other source than the ideas of the Tudors and Stuarts on the subject. But he found that, according to Hallam, this conception of martial law was unknown to England for over two centuries, and was also unknown to every other free constitutional government. This being true, how could such a law exist or be judicially upheld in Rhode Island? He claimed that it was contrary to the Constitution itself inasmuch as the Third, Fourth, and Fifth Amendments of the Constitution seemed to be aimed directly against any use of martial law. At any rate, the power could only be used in time of war, and the general government alone could say that a state of war existed. The Constitution provided, as it does today, that Congress had the power of declaring war, and, in fact, all the war powers were vested in Congress and were prohibited to the states except in cases of such imminent danger as would not admit of delay. In this case he argued that there had been no imminent danger and that the state had had plenty of time to call on the general government for aid and to receive troops in return. But no troops were sent. Therefore, it could not be a state of war.[5]

The proper term for the disturbance that took place in Rhode Island is "domestic violence"; and said Justice Woodbury:

> . . . domestic violence is still to be regarded, not as a state of war, giving belligerent rights, but as conferring only the powers of peace in a State, through its civil authorities, aided by its militia,

[5] Dissenting Opinion. *Luther* v. *Borden*, 7 Howard 1 (1848), p. 16.

till the general government interferes and recognizes the contest as war, . . . the state legislature alone possessed no constitutional authority to establish martial law, of this kind and to this extent, over her people generally, whether in peace or civil strife. . . .

It looks certainly, like pretty bold doctrine in a constitutional government, that even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet. But bolder still is to justify a claim to this tremendous power in any State, or in any of its officers, on the occurrence merely of some domestic violence.[6]

What policy, then, according to Justice Woodbury, should the state pursue with respect to domestic violence? Not to supplant civil law with martial law, but to retain civil law and have the militia and all military forces act in co-operation with and in subordination to the civil authorities. This, he urged, had proved successful in England where, since the passing of the Riot Act, all domestic violence had been put down without recourse to martial law, simply by making the militia act in co-ordination with the civil forces. The same thing, he claimed, had been successful in America. During Shay's Rebellion the militia had been called out, but the civil courts had not been suspended, and no section of the state had been put under martial law. In the Whiskey Rebellion the forces had acted only in supplementing the civil authorities, Washington having ordered:

That the army should not consider themselves as judges or executioners of the law, but as employed to support the proper authorities in the execution of them.

Therefore the course rightfully to be pursued, he concluded, was to resort to municipal precepts, next strengthening them by the militia if resisted, and then, if the opposition was in battle array, to get assistance from the general government. For he stated:

Under the worst insurrections, and even wars, in our history, so strong a measure as this is believed never to have been ventured

[6] *Ibid.*, p. 38.

on before by the general government, and much less by any of the States, as within their constitutional capacity, either in peace, insurrection, or war. And if it is to be tolerated, and the more especially in civil feuds like this. . . . It would go in practice to render the whole country—what Bolivar at one time seemed to consider his —a camp, and the administration of the government a campaign.[7]

There is much that is good in Justice Woodbury's opinion, for his method of treating disturbances would in many cases prove effective, but there might arise a time when such a system of action would not work. Also his separation of domestic violence and war has not been accepted by the authorities or the courts,[8] and united with this is the fact that a state of war can exist without a declaration by Congress.[9]

The majority decision did not confine the states' power within such narrow limits, but held that the use of martial law by Rhode Island was constitutionally permissible and, indeed, an essential power given to the states for their protection. Chief Justice Taney gave the majority opinion:

The remaining question is, whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking into and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably, a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the state authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free

[7] *Ibid.*, pp. 47, 52.
[8] *Ex parte McDonald,* 49 Mont. 454 (1914) is an exception.
[9] *The Prize Cases,* 2 Black 635 (1863).

institutions, and is necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed resistance so formidable and so ramified throughout the State as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.[10]

Chief Justice Taney also laid down rules with respect to the liability of the officers enforcing martial law. He said that during the reign of martial law the officers recognized in its military service

. . . might lawfully arrest anyone, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury willfully done to persons or property, the party by whom, or by whose order, it is committed, would undoubtedly be answerable.[11]

In short, it was the opinion of the Court that domestic violence might constitute war, and that in time of war recourse to martial law was not only permitted to the state but was one of the state's essential powers of self-preservation. But the state's officers could be held accountable for their actions at the restoration of civil courts if such actions were malicious and unnecessary.[12] Such is the first statement of the use of martial law by the states given by the Supreme Court.

[10] *Luther* v. *Borden*, 7 Howard 1 (1849), 13.

[11] *Ibid.*, pp. 13-14.

[12] In *Despan* v. *Olney*, 7 Fed. Cas. No. 3,822 (1852), a case that resulted from this same trouble, the Federal Circuit Court held that an officer acting under martial law could justify his action by an order from a superior officer. If there is any abuse the superior officer is held accountable.

Another point with reference to martial law was raised in the Massachusetts case of *Commonwealth* v. *Blodgett*:[13] the question of how far a state, in carrying out martial law, could interfere with the rights and privileges of the citizens of a neighboring state.

A law in Massachusetts prohibited the kidnapping of persons for transportation into another state. Even though primarily a slave measure, it applied to all persons within the bounds of the state. Blodgett and others were members of the Rhode Island state militia and had orders to pursue and capture the insurgents of the late rebellion. Some of the insurgents fled across the Massachusetts border, but were still pursued by Blodgett and his men. They were finally captured in a tavern in a Massachusetts town and were held in imprisonment for transportation across the border into Rhode Island. Suit was brought against Blodgett for violating the kidnapping ordinance, while he claimed that he was acting under orders of his state and was, therefore, not responsible for his actions.

It was held that "one state of the union, in time of insurrection and civil war in that State, has no authority to give orders to her troops to pass over the lines and into the territory of another state, to protect herself against insurgents, and to capture her rebel citizens who have recently fled over those lines." Therefore a state must confine its execution of martial law to its own limits. Furthermore, orders given to her soldiers or citizens to do so cannot shield them

> . . . from being criminally responsible, in the courts of another State, for their seizing such insurgents, though such citizens or soldiers, when acting under such orders, are subject to martial law in their own State.

But this statement was qualified:

> unless there be a necessity, or probable cause of necessity, for the defense or protection of the lives and property of the citizens of such other State, or for the defense of the State itself, that the acts directed by such orders should be done. And of this necessity,

[13] 12 Metcalf (Mass.) 56 (1846).

or probable cause of necessity, the jury, and not the authorities of such other State, are the ultimate judges.[14]

The rule, therefore, that is laid down in this case is that a state can send its officers into another state to carry out measures instigated by martial law when necessary. But the state itself is not the ultimate judge of the necessity; this rests with the jury before whom the case is tried.

Although the use of martial law was thus sanctioned by the Supreme Court, it was not used by the states to any great extent until the beginning of the present century, when it was again employed in the struggle between capital and labor. Throughout United States history the case of *Luther* v. *Borden* has been cited on every occasion of the use of martial law, and it is truly the foundation for its employment by the states.

[14] *Ibid.*

Chapter III

MARTIAL LAW AND THE WRIT OF HABEAS CORPUS

THE WRIT OF habeas corpus is very closely related to martial law, although the exact nature of this relationship has been very difficult to ascertain because of the difference of opinion concerning the nature and use of the writ itself. Until a clear conception of the writ is obtained, a study of its relationship with martial law is impracticable. Therefore it is necessary first to study the development of the writ in the United States, how it has been used, and upon what occasions it has been suspended.

The particular writ which conflicts with the use of martial law is the writ of habeas corpus ad subjiciendum, the issuance of which demands that a body of a person confined in prison be brought before a court or judge, that he may be given a fair trial, and either be sentenced according to his just deserts or be set free. It is the guarantee of personal liberty. The writ of habeas corpus has an English derivation, although it is expressed in Latin. Its meaning and use were transported directly to America from England.

Still a part of English law, the writ of habeas corpus may today in England be suspended on two occasions: first, when a bill of such nature is passed by both houses of Parliament; and secondly, when the use of martial law subordinates the civil courts to the military power and makes employment of the writ impossible. Martial law may be brought about by an act of Parliament or through the prerogative of the Crown.[1] If it occurs in the last-named manner, then it is possible to have the suspension of the writ in England, indirectly of course, without its being a measure of Parliament. The Crown will, of course, use this power sparingly and only in exceptional

[1] *In the Matter of a Petition of Right* [1915], 3 K. B., 649.

cases, for at any time this prerogative might be taken away by Parliament. Thus, very little danger of an oppressive use of the suspension of the writ of habeas corpus exists in England today.

The colonists wished to bring the writ of habeas corpus to America and to have it used as it was in England. Their valuation of the writ was very high, because to them the guarantee of personal rights was the highest point a government might attain. The act itself was not exactly adopted by the colonists, nor did Parliament pass a bill extending it to America, but in many cases similar statutes were adopted and the results of the writ were attained, more or less, by various methods.

The colonists of Massachusetts and South Carolina passed acts asserting the privilege of the writ of habeas corpus. The one in Massachusetts was set aside because it was held that the Habeas Corpus Act of Charles II did not extend to the colonies. The law in South Carolina provided that "all and every person which now is or hereafter shall be within any part of this Province, shall have to all intents, constructions and purposes whatsoever, and in all things whatsoever, as large, ample and effectual right to and benefit of the said Act, commonly called the Habeas Corpus Act, as if he were personally in the said Kingdom of England."[2] South Carolina was the only colony that succeeded in retaining its habeas corpus act. However, it is stated on good authority that these laws were dissallowed, yet the colonists secured the protection of the writ through the common law.[3] A. H. Carpenter concluded an article on the writ of habeas corpus in the colonies by saying:

In conclusion, it may be added that the rights of the colonists as regards the writ of habeas corpus rested upon the common law with the exception of South Carolina, which re-enacted the English statute. The lack of statute law did not mean that the colonists had no protection for their personal rights, for the want was supplied by the common law, and also by the placing of habeas corpus provisions in their court laws. Then too they passed very strict

[2] *Statutes at Large of S. C.*, ed. Thomas Cooper, II, 400.
[3] Evarts B. Greene, *Provincial America*, p. 202.

bail laws with heavy penalties for their non-fulfilment. Still another protection is to be found in the strong public opinion, so well, shown in the hissing of court officers for making insufficient returns. In the majority of the colonies formal habeas corpus acts were not passed until after the American Revolution, when they were free from any hindrance on the part of England. In their legislation, however, there was no violent departure from the law of England, which showed the close relation felt by the colonists in the common inheritance of the English law.[4]

It is significant that one of the grievances listed in the Declaration of Independence was that through the "Quebec Bill" England had refused the privilege of the writ in a large territory of the West.

The Articles of Confederation made no reference to the writ, but in the Constitution guarantees of the personal liberty of the citizens with respect to seizures, arbitrary arrests, and methods of trial were placed in the Fourth, Fifth, Sixth, and Eighth Amendments, while Article 1, Section 9, reads that "the privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."[5] The term is not defined in the Constitution, for it was probably assumed that its meaning and use would be understood by all. This assumption has permitted the development of vast differences of opinion concerning the nature of the writ.

At the very beginning the point can be definitely settled that Congress can suspend the privilege of the writ and declare martial law only in a time of insurrection or rebellion. This power, which is recognized in this clause of the Constitution, comes from the war powers, strengthened by the necessary and proper clause. The question arises, however, whether Congress is the only body that can suspend the privilege of the writ or whether the President has a similar power. It is recognized,

[4] A. H. Carpenter, "Habeas Corpus in the Colonies," *American Historical Review*, VIII (Oct., 1902), 26, 27.

[5] Article 1, Sec. 9, *Constitution of the United States.*

of course, that the restriction just cited refers only to the national government and not to the several states.[6]

In the first place, in England, where the writ originated, Parliament and not the King has the power to suspend the writ directly. Since the writ was used for the same purpose in America as in England, there was reasonable ground to suppose that it could be suspended by the same branch of government.

In the second place, the location of the clause in the Constitution providing for the suspension of the writ has an important bearing upon its meaning. It is in the section of the Constitution devoted to the legislative department. After stating what Congress can do, the Constitution then places restrictions upon Congress. The first among these refers to habeas corpus and provides that Congress can suspend it only in case of rebellion or invasion, and even then it is limited to the time when the public safety shall require it. The question is whether this clause restricts the power of suspending the writ to Congress alone, and then only in time of rebellion or invasion when the public safety requires it, or whether the clause is merely a restriction upon the suspension of the writ by Congress. In other words, granted that Congress can suspend the privilege of the writ, under the restrictions placed upon its suspension by the Constitution, is it ever lawful for the President to suspend the writ? This problem was exhaustively examined during the Civil War when opinions, pamphlets, and even books were written upon the subject.

In the ante-bellum period the opinions of the courts and the writings of the commentators upon the law strengthened the conclusion that the suspension of the privilege was limited to the legislative branch of the government. In the only case coming before the Supreme Court upon this question, Chief Justice Marshall considered it purely a legislative function. In the decision of *Ex parte Bollman* he said:

> If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends upon political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.[7]

This case, dealing with the Burr conspiracy, was the only occasion previous to the Civil War upon which the habeas corpus question was discussed by the Supreme Court.

During the Burr conspiracy the question of whether the writ should be suspended came before Congress. In the debate upon the question it was evident that the majority of the members of Congress considered that the writ could be suspended only by Congress itself. In other words, it was a legislative power only.[8]

The decision of the Louisiana Court in *Johnson* v. *Duncan* also followed the view of the Supreme Court. Both Justices Martin and Derbigny maintained the writ could be suspended only by the legislative department and that General Jackson's suspension of the writ was illegal. Without doubt the judicial branch of the government considered the suspension of the writ as a purely legislative function.[9]

Eminent law authorities also concurred in this view. Justice Story said:

> It is obvious that cases of a peculiar emergency may arise which may justify, nay, even require, the temporary suspension of any right to the writ. . . . Hitherto no suspension of the writ has ever been authorized by Congress, since the establishment of the Constitution. It would seem, as the power is given to Congress to suspend the writ of *habeas corpus* in cases of rebellion or invasion, that the right to judge whether the exigency has arisen must exclusively belong to that body.[10]

Caleb Cushing, while Attorney-General, gave an opinion which bore directly upon the question of the suspension of the writ. Speaking of the constitutional limitation, he said:

> This negation of power follows the enumeration of the powers of Congress; but it is general in its terms; it is in the section of

[7] *Ex parte Bollman,* 4 Cranch 75 (1807), p. 101.
[8] *Annals of Congress,* XVI, pp. 402, *et seqq.*
[9] *Johnson* v. *Duncan,* 3 Martin (La.) 530 (1815).
[10] Joseph Story, *Commentaries on the Constitution of the United States,* Sec. 1342.

things denied, not only to Congress, but to the Federal Government as a government, and to the States. I think it must be considered as a negation reaching all the functionaries, legislative or executive, civil or military, supreme or subordinate, of the Federal Government: that is to say, that there can be no valid suspension of the writ of *habeas corpus* under the jurisdiction of the United States, unless when the public safety may require it, in cases of rebellion or invasion. And the opinion is expressed by the commentators on the Constitution, that the right to suspend the writ of habeas corpus, and also that of judging when the exigency has arisen, belong exclusively to Congress.[11]

Cushing therefore concluded that it was exclusively a congressional power.

The exception to the above opinion was the action of Congress concerning the refunding of the fine of General Jackson. The conclusion might be reached that prior to the Civil War it was the general opinion of the writers and authorities upon this question that the power of suspending the writ was a purely legislative function.

At the outbreak of the Civil War the President reluctantly[12] suspended the privilege of the writ of habeas corpus and claimed that it was a necessary adjunct to his powers of Commander-in-Chief of the Army and Navy. The question whether the President's exercise of power was constitutional came before the Circuit Court in *Ex parte Merryman*. Chief Justice Taney held that the President's assumption of power was unconstitutional.[13]

[11] 8 *Opinions of Attorney-General*, p. 372, rendered 1857.

[12] See Lincoln's Message to Congress, July 4, 1861 (James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, VI, 20). See also James G. Randall, *Constitutional Problems under Lincoln*. The constitution of the Confederate States stated in the article devoted to legislative powers that the privilege of the writ of habeas corpus could be suspended only in case of rebellion or invasion when the safety of the country required it (Art. I, Sec. IX, Par. 3). The Congress of the Confederacy delegated this power to the President to suspend the privilege of the writ, and President Jefferson Davis in issuing his declarations of martial law would usually start his proclamation by saying: "Whereas the Congress of the Confederate States has by law vested in the President the power to suspend the writ of *habeas corpus*" and then proclaim martial law. Thus he gave as the source of his power the authorization by Congress (James D. Richardson, *A Compilation of the Messages and Papers of the Confederacy*, I, 219).

[13] This case was not argued in court and was never considered by the Supreme

The facts of the case are that Merryman, a citizen of Maryland, while in his home was arrested by an armed force and conveyed to Fort McHenry. He was arrested under orders from the commanding general upon charges of treason and rebellion. The Baltimore Riots had just taken place, and Merryman was suspected of being one of the ringleaders. He asked for a writ of habeas corpus from the civil court and it was granted, but when the writ was delivered to the Commander of the Fort, the latter refused to obey it, because he had been authorized by the President to suspend the writ. In his opinion the Chief Justice said:

> The case, then, is simply this: a military officer, residing in Pennsylvania, issues an order to arrest a citizen of Maryland, upon vague and indefinite charges, without any proof, so far as appears; under this order, his house is entered in the night, he is seized as a prisoner, and conveyed to Fort McHenry, and there kept in close confinement; and when a habeas corpus is served on the commanding officer, requiring him to produce the prisoner before a justice of the supreme court, in order that he may examine into the legality of the imprisonment, the answer of the officer, is that he is authorized by the president to suspend the writ of habeas corpus at his discretion, and in the exercise of that discretion, suspends it in this case, and on that ground refuses obedience to the writ.[14]

The decision of the case was against the President's having this power, and the reasons given by the Chief Justice for considering it only a legislative power were: first, in England it was considered a legislative power alone, for Parliament and not the King had the power of suspending the writ; second, its position in the Constitution supported this view. Taney maintained:

> This article is devoted to the legislative department of the United States, and has not the slightest reference to the executive department. . . . It is the second article of the Constitution that provides for the organization of the executive department, enumerates the powers conferred on it, and prescribes its duties. And if the high power over the liberty of the citizen now claimed, was

[14] *Ex parte Merryman,* 17 Fed. Cas. No. 9,487 (1861), 147-148.

intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.[15]

Third, from the judicial opinions since the adoption of the Constitution and from the opinion of authorities upon the law, Chief Justice Taney concluded that Lincoln's suspension of the writ was an unlawful exercise of authority.

Upon the rendering of this decision, the country was flooded with controversial articles, books, and innumerable pamphlets on this subject. Chief Justice Taney's position did not lack contemporary support, for in many of the pamphlets that appeared just after the *Merryman* decision concerning the power of suspending the writ, there was a condemnation of the President's action and an agreement with the conclusion reached by the Chief Justice. The arguments of most of these writers were the same as Taney's.[16] Their main contention was that the habeas corpus clause was a restriction upon the exercise of the suspension power by Congress, that is, a restriction upon the exercise of a legislative power. One writer went so far as to doubt whether Congress could authorize the President to suspend the writ in optional cases because it was a delegation of trustee powers.[17]

B. R. Curtis argued:

. . . there is no warrant whatever in the Constitution; a power which no free people could confer upon an executive officer, and remain a free people. For it would make him the absolute master of their lives, their liberties, and their property, with power to delegate his mastership to such satraps as he might select, or as might be imposed. . . . Let us beware how we borrow weapons from the armory of arbitrary power. They cannot be wielded by the hands of a free people. Their blows will finally fall upon themselves.[18]

[15] *Ibid.*, pp. 148-149.

[16] Especially those by Tatlow Jackson, John T. Montgomery, James F. Johnson, Charles H. Gross, and William Kennedy. All are included in *Campbell's Pamphlets.*

[17] Tatlow Jackson in "Authorities cited antagonistic to Horace Binney's Conclusions," *ibid.*, p. 8.

[18] Benjamin R. Curtis, *Executive Power*, p. 30.

The President's defense was undertaken by his Attorney-General, Bates, who maintained that

> The *executive* powers are granted generally, and without specification; the powers *not* executive are granted specially, and for purposes obvious in the context of the Constitution. And all these are embraced within the duties of the President, and are clearly within that clause of his oath which requires him to "faithfully execute the office of President." . . .
>
> It is the plain duty of the President (and his peculiar duty, above and beyond all other departments of the Government) to preserve the Constitution and execute the laws all over the nation; and it is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations to resist the General Government. . . . And this duty is imposed upon the President for the very reason that the courts and marshals are too weak to perform it. The manner in which he shall perform that duty is not prescribed by any law, but the means of performing it are given in the plain language of the statutes, and they are all means of force.[19]

The Attorney-General maintained that the President therefore did not have to obey a writ of habeas corpus issued by a court because the President and the judiciary were co-ordinate departments of government, and one was not subordinate to the other. He concluded his argument by saying that the constitutional provision was not a grant of power but a limitation; therefore, the President had power during a rebellion or insurrection to arrest persons "implicated in that rebellion," and he also had the power "to suspend the privilege of persons arrested under such circumstances."[20]

A pamphlet ably supporting the President's course was written by Horace Binney. With respect to Taney's opinion itself, Binney did not give it much weight because he thought that it was not an authority in a judicial sense and that in the full sense it was not an argument. "He does not argue the question from the language of the clause, nor from the history of

[19] 10 *Opinions of Attorney-General,* 82-83, rendered in 1861.

[20] *Ibid.,* p. 90.

the clause, nor from the principles of the Constitution, except by an elaborate depreciation of the President's office. . . ."[21] In fact, he thought that it showed disaffection toward the President and was rather personal.

With respect to the argument, Binney believed that the analogy with the English mode of procedure was imperfect and even harmful. He also maintained that the position of the clause in the Constitution was not of the least importance: "The simple and clear language of the clause is, in what it directly expresses, restrictive of all power; in what it inversely expresses, it is permissive of some power, and authoritative as to its application in the contingencies stated."[22] Therefore it indirectly implied that the executive department had the power of suspending the privilege of the writ.

"What would be the use of maintaining the power only as a legislative function?" he asked.

> The Legislature cannot execute the power itself. If the power is limited to them, they must delegate it to somebody. All that is claimed for Congress to do, is upon some judgment of the facts which constitute the danger to the public, to commit the discretion to the Executive. But why form a judgment, and then leave the whole judgment to the Executive as they must? Why claim for Congress the power to suspend, when the actual efficient power as an Executive act, must be with the President?[23]

Binney was forced to conclude that the suspension of the privilege of the writ was not limited to any one governmental organ by the Constitution, but

> Whichever power of the constituted government can most properly decide these facts, is master of the exception, and competent to apply it. Whether it be Congress or the President, the power can only be derived by implication, as there is no express delegation of the power in the Constitution; and it must be derived to that department whose functions are the most appropriate to it. Congress cannot *executively* suspend.

[21] Horace Binney, "The Privilege of the Writ of Habeas Corpus under the Constitution," *Campbell's Pamphlets*, p. 36.

[22] *Ibid.*, pp. 32-33.

[23] *Ibid.*, pp. 47-48.

The President being the properest and the safest depositary of the power, and being the only power which can exercise it under real and effective responsibilities to the people, it is both constitutional and safe to argue, that the Constitution has placed it with him.[24]

Probably the most interesting defense of the President's power of suspending the writ was given by Joel Parker. He did not contend that Congress alone could suspend the writ, but that the President could suspend it by declaring martial law. Suspension of the writ of habeas corpus was an essential factor in the use of martial law. Regardless of whether it was a legislative or executive function, he maintained that the suspension of the writ was an executive power whenever it occurred through the use of presidential power to declare martial law:

. . . the Constitution did not intend to confer, in terms, any power to grant the writ of *habeas corpus*, nor any power to suspend it, but left the power to grant and the power to suspend to be settled by general principles, with the single exception of a limitation upon the power of suspension to the two exigencies which it specified.

There is therefore no question whether the Constitution, in the clause mentioned, confers the power of suspension upon Congress alone, or whether it gives it to the President also; for it gives it to neither. The power exists as an incident to other powers expressly conferred.[25]

The suspension of the writ then would be limited only by the bounds of the major powers of which it was a part. He continued:

. . . in time of actual war, whether foreign or domestic, there may be justifiable refusals to obey the command of the writ, without any act of Congress, or any order or authorization of the President, or any State legislation for that purpose; and the principle upon which such cases are based is, that the existence of martial law, so far as the operation of that law extends, is, *ipso facto,* a suspension of the writ.[26]

[24] *Ibid.*, p. 58. [25] Joel Parker, *Habeas Corpus and Martial Law*, pp. 27, 28.
[26] *Ibid.*, pp. 28-29.

When this doctrine was applied to the *Merryman* case, it seemed that the President had overstepped his powers, but Joel Parker justified the President's suspension of the writ, by claiming it was an auxiliary measure used in declaring martial law. Baltimore, however, was outside the war zone, and according to the decision of the different courts the President's power could not extend that far. Parker stated:

> Whether those troops are in the face of the enemy, in battle array, or whether they are merely garrisoning a fort to aid thereby in suppressing a rebellion, or whether they are opening and holding the avenues by which the passage of other troops to the theater of active war is to be facilitated, the law which governs the place where they are is martial, not municipal.[27]

Immediately after the *Merryman* decision and as long as the war continued, cases arose in the state and federal courts concerning the power of suspending the writ. Abraham Lincoln ignored Taney's opinion and refused to turn Merryman over to the court. As a consequence, two lines of constitutional argument were developed, one justifying the viewpoint of Lincoln, and the other, that of Taney. The state and federal courts also divided upon this question; their decisions were impossible to reconcile. Lincoln's action received the approval of his Attorney-General and, to a large extent, that of public opinion. It was a war measure and was made in good faith. A judge, in giving his decision adverse to the viewpoint of Lincoln, would not doubt the sincerity of Lincoln, but would maintain that the President was legally wrong, and the statement was usually made that, as Lincoln firmly believed that he was right, so the judge from the same sense of justice and right was forced to differ from the President's opinion. While Lincoln's position was condemned by many, it was strongly defended by other groups.

Many men today believe that his position was constitutional. Burgess says:

[27] *Ibid.*, p. 40.

It may, therefore, be claimed that it is the precedent of the Constitution in civil war that the President may suspend all the safeguards of the Constitution in behalf of personal liberty anywhere within the country, taking upon himself the responsibility therefore to Congress, and that subsequent authorization by Congress to do the like things in future works indemification, and makes the preceding presidential assumptions legitimate and lawful, if they lacked anything of being so before.[28]

Berdahl agrees with this view and thinks that Lincoln's use of the suspension of the writ and his substantiation by Congress must be considered as the true precedent of the Constitution rather than the opinion of the court upon the same question.[29]

In a monograph concerning Lincoln's suspension of the writ, Professor Sellery thinks that the long acquiescence by Congress in the President's suspension, coupled with the formal enactment of the measure giving the President power to suspend the writ, was recognition on the part of Congress of this presidential power.[30] Professor Randall believes that Lincoln's conception of his powers was too expansive and that a clearer distinction between military and civil control was greatly to be desired. He is, however, unable to evade the fact that the President actually suspended the writ and was not restrained in so doing by either Congress or the courts.[31]

Turning to the cases, it will be found that there are many decisions that hold the suspension of the privilege of the writ is a legislative function.[32] The cases which sustain the viewpoint of Chief Justice Taney generally use his line of argument developed in the *Merryman* decision. The decisions contrary to Taney's viewpoint justify their conclusions by saying that the President's suspension of the privilege of the writ is

[28] John W. Burgess, *The Civil War and the Constitution*, II, 217.

[29] Clarence A. Berdahl, *War Powers of the Executive in the United States*, p. 192.

[30] George C. Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, pp. 264-265.

[31] Randall, *op. cit.*, pp. 184-185, 137.

[32] *People* v. *Gaul*, 44 Barbour (N. Y.) 98 (1865); *In re Kemp*, 16 Wis. 382 (1863); *Ex parte Benedict*, 3 Fed. Cas. No. 1292 (1862); *Ex parte Moore*, 64 N. C. 802 (1870).

a legitimate exercise of his power to declare martial law.[33] In the case of *Ex parte Field* Judge Smalley admitted that Congress has the power of suspending the writ, but at the same time gives the President a similar power indirectly. The President can declare martial law. Martial law and the writ are incompatible. Therefore the President's power to declare martial law necessarily gives him the power to suspend the privilege of the writ.

If the President has this power to declare martial law and then to suspend the writ, what are the limits placed upon its use? In the case of *Ex parte Field* the President's power was extended to the utmost. By that case it was held that the President could suspend the writ and declare martial law in any state of the union whether it was outside or within the war area. No doubt these limits are much too broad, for they would make the President omnipotent in his power over both martial law and the writ. If the President could declare martial law wherever or whenever he desired, without regard to conditions or necessity, and his action still be legal and not reviewable by the courts, then Americans would have the worst kind of autocratic government.

Joel Parker claimed that the President's power extended not only within the war area but also outside; that is, when troops were moving to the front, martial law could extend back into the loyal states because wherever there were troops directly connected with the war then martial law extended so as to include them. In this way he justified the President's use of power when he imprisoned Merryman in Baltimore. This enlarging of the field of martial law was not regarded favorably by the courts, and only in a very few cases was it given any support.[34]

This power, however, in other cases was more closely limited in that it was restricted to the war area itself. It was held in *Jones* v. *Seward*[35] that, when the suspension of the writ

[33] *Ex parte Field*, 9 Fed. Cas. No. 4,761 (1862); *Jones* v. *Seward*, 40 Barbour (N. Y.) 563 (1863); *Griffin* v. *Wilcox*, 21 Ind. 370 (1863); and others.

[34] *Johnson* v. *Jones*, 44 Ill. 142 (1867); *In re Kemp*, 16 Wis. 382 (1863).

[35] *Jones* v. *Seward*, 40 Barbour (N. Y.) 563 (1863).

depended upon martial law being declared by the President, neither the suspension of the writ nor martial law itself could extend beyond the sphere of military operations. Another case stated:

> The war power of the President, then, may be stated thus: He has a right to govern, through his military officers, by martial law, when and where the civil power of the *United States* is suspended by force. In all other times and places, the civil excludes martial law—excludes government by the war power.[36]

During Reconstruction days in North Carolina there occurred an insurrection in Alamance County. Colonel Kirk, who was in charge of the military, refused to honor a writ of habeas corpus issued by the Supreme Court of North Carolina. He claimed that if he did so he would violate the orders of Governor Holden. In the case of *Ex parte Moore*[37] the court followed the example of Chief Justice Taney and upheld its right to issue the writ. The Governor still refused to turn the prisoners over to the civil authorities, and Chief Justice Pearson could do nothing except say, "I have discharged my duty; the power of the Judiciary is exhausted, and the responsibility must rest on the Executive."[38]

The general circumstances under which this power could be used had already been given by the Supreme Court in the decision of *Mitchell* v. *Harmony*, a case arising from Doniphan's Expedition during the Mexican War. It related to private property, but it applied to personal liberty as well. Private property might be taken by a military commander

> . . . to prevent it from falling into the hands of the public enemy. . . . But the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and when the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the

[36] *Griffin* v. *Wilcox*, 21 Ind. 370 (1863), p. 386.
[37] *Ex parte Moore*, 64 N. C. 802 (1870). [38] *Ibid.*, p. 811.

right, and the emergency must be shown to exist before the taking can be justified.[39]

In conclusion, it should be said that there was a strong opinion during the Civil War that the President, through his power to declare martial law, could indirectly suspend the writ. His power could be exercised in the war area and outside the war zone in case of an emergency. The case of *In re Kemp*[40] not only describes the conditions under which the suspension of the writ could take place outside of the war zone, but also at the same time gives the purpose for which the constitutional provision was intended and the different circumstances under which it might be used. In this opinion it is clearly shown that the constitutional provision is not rendered useless by this power of the President, but that there is a distinction between the suspension of the privilege of the writ under Section 9, Article 1, of the Constitution and the right of a military commander to disregard all writs served upon him by the civil power. Judge Payne, giving the decision, said:

These considerations convince me, beyond any doubt, that it was not this military power that the constitution had in view, and upon which it imposed the prohibition. On the contrary, it left the *habeas corpus* to be affected by the occasional exercise of this power, based upon an existing necessity, in the same manner that other civil process might be affected. Thus, suppose a general about to engage in battle, or to make some military movement requiring immediate action, and a civil officer should come with a writ of *replevin* to seize his artillery, horses or any other personal property equally essential to his success, under a claim that the property had been stolen from the true owner and sold to the government by a person who had no title. Would not the commander be justified in disregarding the process, just as he would a *habeas corpus*? Clearly so, and by the same reasoning. He might even seize such property from the owner, in a pressing emergency, and disregard all attempts to recover it by civil authority. Such are the necessities of war, growing out of the execution of actual military operations. . . . The constitution makes no attempt to limit this power

[39] *Mitchell* v. *Harmony*, 13 Howard 115 (1851), p. 134.
[40] *In re Kemp*, 16 Wis. 382 (1863).

with respect to any other process, and I think it made none in respect to the writ of *habeas corpus*. It left that to be superseded by martial law wherever martial law was properly declared by a military officer, just as all other civil authority was for the time suspended by it. . . .

But there may be at times a necessity entirely distinct from all this, why the officers of the government should be relieved from being called to account by the writ of *habeas corpus,* and being compelled to show a good legal cause for imprisoning every person whom they hold. There may be times in a rebellion, when, even in states professedly loyal, and which are not the theater of war, the atmosphere may become pestilent with treasonable sympathy. There may be well grounded suspicions of guilt, but no overt act capable of being proved. Sedition and disaffection may be paralyzing the vital powers of the government, without perhaps violating any known law. There may be probable cause to believe that disaffection is about to develop into actual crime. The rattle of the serpent may be heard in the air, but owing to the concealment, the exact point at which the blow to crush him should be aimed may not be known. In such cases it may be necessary for the public safety that the government should be permitted to strike swiftly and somewhat at random. There may be no martial law prevailing, no military exigency which would deprive the officer of time to make return to a writ and await trial. Disobedience, therefore, could not be justified on these grounds. Yet, if liable to be called to account and required to show a sufficient legal cause for every imprisonment, the power of the government to defend itself by preventing any intimidating treason might be to a great degree impaired.

It was to meet this necessity that the constitution allowed the writ to be suspended in cases of invasion or rebellion where the public safety required it.

And this power was given to the legislative branch of the government, according to Justice Payne, because

. . . as in Rome there was no officer who could assume the power of dictator upon his own judgment, but such officer had to be appointed by a vote of the Senate, so here the power to suspend the writ of *habeas corpus* would naturally have been entrusted to the

legislature, and not to the executive alone. There the constitution has placed it. So the supreme court of the United States has declared. So it has been held by every judicial decision and every elementary writer on constitutional law.[41]

[41] *In re Kemp*, 16 Wis. 382 (1863), 407-409.

Chapter IV

THE *EX PARTE MILLIGAN* DECISION

AT ALL TIMES during its existence, the Supreme Court has taken an active, although at times a belated, part in all important national problems. On the whole, its influence has been beneficial, for a check is needed upon popular government at critical times. In the days preceding the Civil War the Court gained rapidly in power and esteem, and save for one decision its opinions were received cordially and were obeyed. The *Dred Scott* decision was the exception.[1] Popular opinion in the North could not abide such a decision; as a result, from this one instance, the Court lost much of its prestige.

Ex parte Milligan[2] was similar in many respects to the *Dred Scott* case. The country was still divided, and whatever decision the Court might have given, a storm of protest would have been occasioned. Although the decision raised strong objections at the time, it, unlike the *Dred Scott* decision, was received subsequently as good law and is so regarded in the main at this day. The facts of the case are as follows: during the Civil War, Lambdin P. Milligan, a Northern man with Southern principles, acted in such manner as to cause his loyalty to be questioned. He was arrested by the general commanding the military district of Indiana, and in the fall of 1864 he was tried by a military commission upon the following charges: conspiracy against the United States Government; affording aid and comfort to rebels, including insurrection and disloyal practices; and violation of the laws of war. He was supposedly a member of a secret society called The Order of American Knights, or Sons of Liberty, the purpose of which organization was to overthrow the government and to afford

[1] *Dred Scott* v. *Sandford*, 19 Howard 393 (1857).
[2] *Ex parte Milligan*, 4 Wall. 2 (1866).

aid to the Southern states. Milligan was found guilty upon all these charges and was sentenced to be hanged. The sentence was approved, and the day for the execution was set.

Milligan then applied to the Circuit Court of Indiana for a writ of habeas corpus. He claimed that a military court had no jurisdiction over him, for he had never been in the military service of the United States, nor had he been in any of the states that had rebelled, and that he was simply a citizen of Indiana and was entitled to trial in the civil courts which were then in full operation. Since the judges of the Circuit Court disagreed as to what should be done, a question was certified to the Supreme Court as permitted by the Act of Congress of April 29, 1802.

The brilliant arguments developed by both sides showed a close study of the question of martial law. The lawyers for Milligan were J. W. McDonald, Jeremiah S. Black, James A. Garfield, and David Dudley Field; counsel for the United States were James Speed, Henry Stanberry, and Benjamin F. Butler.[3] Three weeks after the close of the argument the Court gave its decision. It unanimously agreed that the military commission's trial of Milligan was illegal. The Justices differed among themselves, however, upon the when and where of the power of the President or Congress to institute military courts. This difference resulted in expositions of two views on martial law. The Justices who gave the majority decision were Field, Davis, Nelson, Grier, and Clifford, while the minority was composed of Chief Justice Chase, Justices Miller, Wayne, and Swayne. The decision itself was received, upon the whole, with disgust and horror; the American press thought that it might mean the overthrow of the military government in the South, the ascendancy of the Rebels, and the overthrow of the whole plan of Reconstruction. It failed to do so, however, and has become one of the many so-called "cornerstones of American liberty." Whether there has been deviation from

[3] The arguments of both the lawyers for the defense and for the United States are given along with other material relevant to the case in *The Milligan Case*, ed. Samuel Klaus.

the majority opinion, and whether the minority decision has been adopted in late years, are questions which will be discussed subsequently. In one way or another the *Milligan* case defined the limits of national martial law as *Luther* v. *Borden* did for that used by the states.

The *American Law Review* for April, 1867, in speaking of the decision of the Supreme Court and the manner in which it was received, said:

> The decision of the Supreme Court of the United States in the case of Milligan has called forth a great deal of hostile criticism. The comments which it has provoked are of a most unfortunate nature, and may even be deemed dangerous in their effect upon the public mind. The opinions of the majority and of the minority of the court have been received, not as judicial opinions, but as party votes; and the members of the most exalted tribunal in the nation have been assailed with all manner of abuse. Their offense has been in the minds of some, that they were governed in their decision by their political affinities, while others have charged them with deserting the principles of their party. Inconsistent as are these charges, —groundless as may be the first, and foolish, or worse than foolish, the second,—yet for the existence of these charges the judges themselves, we say it with deep regret, must be held primarily responsible. But the temper of the public mind cannot be justified. The attitude of the people toward the great tribunal which has so much of our liberty and safety in its keeping cannot be considered satisfactory.

However unwise the decision might have been, the writer possessed no good reason for believing that public opinion or political motives had in any way influenced the judges in giving their opinion.[4]

The immediate question before the Court and the decision thereupon was so limited and special that one might wonder how the Court ever contrived to discuss the broad question of martial law. On September 24, 1862, the President issued the following proclamation:

> . . . that during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and

[4] "Milligan's Case," *American Law Review*, I (1867), 572.

abettors, within the United States, and all persons discouraging volunteer enlistments, resisting military drafts, or guilty of any disloyal practice affording aid or comfort to rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by courts-martial or military commissions; second, that the writ of *habeas corpus* is suspended in respect to all persons arrested, or who now, or hereafter during the rebellion, shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any military authority, or by the sentence of any court martial or military commission.[5]

On March 3, 1863, Congress supplemented the proclamation by passing a law which authorized the President to suspend the writ whenever he thought necessary and to detain those persons under arrest by the military authorities without interference by the civil courts.[6] But it was specified that a list of the persons falling under this classification in the states where the civil courts were still open should be furnished to the judges of the federal courts. If then the grand jury failed to indict, the court should discharge such a person on bail, and, if after twenty days no list was received, the prisoner could be discharged. The Supreme Court held that this law covered the case, but that it had not been complied with because Milligan was neither indicted by a grand jury nor was his name placed on the list furnished to the local court.

The majority opinion of the Court was given by Justice Davis. He, more than any other judge, received the rebuke and the abuse of the Northern newspapers for the decision. The *New York Herald* declared:

This two faced opinion of Mr. Justice Davis is utterly inconsistent with the deciding facts of the war, and therefore utterly preposterous. These ante-diluvian judges seem to forget that the war was an appeal from the constitution to the sword. . . . This consti-

[5] Proclamation of Sept. 24, 1862 (James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*, VI, 98).

[6] The President issued another proclamation, by virtue of this act, on Sept. 15, 1863. In this he suspended the privilege of the writ (Richardson, *op. cit.*, VI, 170).

tution twaddle of Mr. Justice Davis will no more stand the fire of public opinion than the Dred Scott decision.[7]

The Court first decided that, in view of the habeas corpus act of 1863, the Indiana Circuit Court had full jurisdiction to act and could issue a writ of habeas corpus, and that if the judges could not agree, it was permitted to the court to certify the question to the Supreme Court for final decision.

The most interesting question that arose was whether the military commission had legal power to try and sentence Milligan. The opinion stated that

> The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials.[8]

The Court believed that only "by that Constitution and the laws authorized by it, this question must be determined." The sections of the Constitution that determined the decision of the case were those which stated that the trial of all crimes, except in cases of impeachment, should be by jury, and also the Fourth, Fifth, and Sixth Amendments which guaranteed to the citizens their individual rights, trial by jury, indictment by grand jury, and protection against undesirable search and seizure without a warrant. The opinion emphasized the fact that without the promise of the first ten amendments the Constitution would never have been adopted and that therefore there must not be any deviation from their precepts.

> No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[9]

Did the trial of Milligan by the military commission violate any of his constitutional rights and were the commission and the method of trial legal? The military tribunal was not a

[7] *New York Herald,* Dec. 19, 1866. Also see *New York Herald* for Dec. 20 and 23, 1866, and Jan. 2-8, 1867. For contemporaneous views of other newspapers see Charles Warren, *The Supreme Court in United States History,* III, chap. 29.

[8] *Ex parte Milligan,* 4 Wallace 2 (1866), 119. [9] *Ibid.,* p. 121.

court ordained and established by Congress according to the Constitution; yet since its establishment was a war measure, was not his trial constitutional? In deciding these important questions the Court made known its attitude upon the extent and use of martial law. Justice Davis, speaking for the Court, said:

It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force . . . has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. . . .

Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power." . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.[10]

The lawyers for the United States claimed that Indiana was in a military district and that therefore the action of the military commission was purely military in nature. But the Court said that

If armies were collected in Indiana, they were to be employed in another locality, where the laws were obstructed and the national authority disputed. On *her* soil there was no hostile foot; if once invaded, that invasion was at an end, and with it all pretext for martial law. Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. . . .

Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of the actual war. Because, during the late Rebellion it could have been enforced in Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed, and justice was always administered.

[10] *Ibid.*, pp. 124, 125.

And so in the case of a foreign invasion, martial rule may become a necessity in one state, when, in another, it would be "mere lawless violence."[11]

Milligan's constitutional guarantees were therefore violated because he was not tried by a court ordained by Congress. Moreover, it was held that the President had no power to constitute such a court because in order to do so he would have to go outside his sphere of action. It could not fall under his war power because martial law could not extend over territory where there was no fighting or fear of invasion and where the civil courts were still functioning in their proper manner. It could not fall upon citizens, such as Milligan, for the reason that it

> . . . can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed. This court has judicial knowledge that in Indiana the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances; and no usage of war could sanction a military trial there for any offense whatever of a citizen in civil life, in nowise connected with the military service. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country even to attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behavior.[12]

The Court concluded that martial law used in this manner was unlawful because

> Military commissions organized during the late Civil War, in a state not invaded and not engaged in rebellion, in which the Federal Courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.[13]

[11] *Ibid.*, pp. 126, 127. [12] *Ibid.*, pp. 121-122. [13] *Ibid.*, p. 3.

The Court in its opinion also gave some interesting facts concerning the writ of habeas corpus. It did not question the suspension of the writ in the war area under martial law, for there it was undoubtedly necessary. But with respect to the area of the country outside the war zone, the Court held that

> Neither the President, nor Congress, nor the Judiciary can disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend in certain cases the privilege of the writ of *habeas corpus*.[14]

The Court then showed that the suspension of the privilege of the writ did not, of itself, mean a trial by a court-martial or a military commission, but simply that the person was detained in custody and denied trial in the civil courts until it became agreeable to the military authorities that the trial should be commenced. Therefore the Court concluded that

> A citizen not connected with the military service and resident in a State where the courts are open and in the proper exercise of their jurisdiction cannot, even when the privilege of the writ of habeas corpus is suspended, be tried, convicted or sentenced otherwise than by the ordinary courts of law.[15]

This decision was one of many limiting decisions upon the power of the federal government given by the Supreme Court in the period just at the close of the Civil War. Undoubtedly it had been necessary in time of war to extend the federal powers to the utmost, but now there were limits that must be preserved, and it was the Supreme Court that preserved these bounds. In this case the Supreme Court thought that the federal government had overstepped its authority, not with respect to the states, but with respect to the citizens themselves, and, as a result, the above decision not only corrected the wrong done in that particular case but also formed a precedent upon the use of martial law and where it might be exercised.

In giving the minority decision, the Chief Justice stated that all four judges in the minority concurred with the majority

[14] *Ibid.*, p. 4. [15] *Ibid.*

except in some important particulars concerning the powers of Congress. They agreed that the Circuit Court was necessarily compelled to hear Milligan's petition for a writ of habeas corpus, and ought, therefore, to have issued the writ. They also agreed that, if the writ should be issued, he should not be considered as free of all liability, inasmuch as, from the evidence, he had committed grave and serious crimes for which, if convicted, he should be punished. But such trial and punishment must be before the proper tribunal. He ought, therefore, to be discharged from the power of the military commission. From necessity, the Chief Justice maintained that, under the facts stated, the military commission did not have the power to try and sentence Milligan. According to Chief Justice Chase, the ground upon which the minority differed was this:

> But the opinion which has just been read goes further; and as we understand it, asserts not only that the military commission held in Indiana was not authorized by Congress, but that it was not in the power of Congress to authorize it; from which it may be thought to follow, that Congress has no power to indemnify the officers who composed the commission against liability in civil courts for acting as members of it.
>
> We cannot agree to this. . . .
>
> We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.[16]

By the Constitution, Congress has power to raise and support armies and the navy, to provide for their government, and to condemn to death without a jury trial a person within the service. The minority thought that the power of Congress to govern the land and naval forces was not affected by the amendments of the Constitution. Therefore the military commission could be established. However, could it try civilians? Chief Justice Chase held that

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and suc-

[16] *Ibid.*, pp. 136-137.

cess, except such as interfers with the command of the forces and the conduct of the campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.[17]

Congress cannot apply the laws of war indiscriminately, but

Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline or security of the army or against the public safety.[18]

Indiana was in a disturbed state, invasion was threatened, and it was in the area of military operations. The minority could not doubt

. . . that, in such time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. The fact that the Federal courts were open was regarded by Congress as a sufficient reason for not exercising the power; but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.[19]

The minority disclaimed any purpose of discussing martial law or its uses, except merely to refute the claims of the majority. However, at the very close of the opinion Chief Justice Chase defined martial law and separated it from military law. His statement is quoted by all writers on martial law because it is a concise definition of martial law by an authority:

There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be

[17] *Ibid.*, p. 139. [18] *Ibid.*, p. 140. [19] *Ibid.*, pp. 140-141.

exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the expressed or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.[20]

The statement in the majority opinion that martial law can never be executed when the civil courts are open and in the proper and unobstructed exercise of their jurisdiction,[21] has been subjected to misinterpretation. The *Milligan* case, in late years, has been called upon to prove that when the civil courts are open, martial law cannot be used. Such an interpretation is erroneous. The "open" court must have unobstructed exercise of its jurisdiction, and it is possible that the court might be open and yet its jurisdiction be obstructed. Therefore, to make the broad statement that, by the *Milligan* case, martial law cannot be established when the civil courts are open is incorrect, for the courts must also be unobstructed and functioning in the proper manner.

In conclusion, the majority opinion clearly held that the Bill of Rights was never suspended even during the great exigencies of government and that the military tribunal in this case was not constitutional: first, because the locality was

[20] *Ibid.*, pp. 141, 142.

[21] *Ibid.*, p. 127.

outside the war zone, and second, because martial law could not be used when the civil courts were open and in the proper and unobstructed exercise of their jurisdiction.

The minority, on the other hand, maintained that through war powers Congress did have the right to authorize the courts. Of course, Congress could not exercise this power in time of peace, but Congress decided when there was peace or war and in what districts there existed such conditions as to justify the authorization of martial law. Therefore the minority held that the trial of Milligan was conducted by a properly constituted court.

Such is the gist of the famous case of *Ex parte Milligan*. Whether the majority or the minority decision has been considered the true law in the cases that have arisen since the Civil War, will be determined later.[22]

[22] What really happened to Milligan is a question frequently asked by the readers of the case which very few people can answer. Milligan was sentenced by the military commission to be hanged on May 19, 1865. A few days before the execution was to have taken place, the sentence was suspended awaiting the decision concerning his application for a writ; but in June President Johnson commuted his sentence to life imprisonment. He was placed in the Ohio penitentiary, but after about a year, when the decision of the Supreme Court was announced, he was released. Later he brought suit against the Military Commander of the Indiana district for damages. The decision of the court was in his favor, but the damages awarded by the decision were negligible.

Chapter V

THE RISE OF QUALIFIED MARTIAL LAW

MARTIAL LAW IN IDAHO IN 1899

THE USE OF martial law by the state governments has been an outstanding development of the last forty years. During the period following the Civil War, martial law became unnecessary as a general measure because of the absence of foreign or civil wars. With the growth and unification of both capital and labor, the need for martial law returned, but when it returned its use was shifted from the hands of the federal government to those of the states. True, the boycott, lockout, and strike in themselves have had no connection with martial law, but in many cases strikes accompanied by violence and disorder have been characterized as insurrection and rebellion. Strikes have usually been confined to the limits of a single state; the duty of settling the strike, preserving order, and acting the part of an overseer, has devolved upon the state rather than upon the federal government.

In order to control the situation and to preserve law and order, the state governments must have the power to declare martial law or they would become impotent and farcical organizations. Martial law has therefore been used by the states; its use has been upheld, not only in the state courts, but also by the Supreme Court of the United States. With the exception of *Luther* v. *Borden* most of the cases concerning the use of martial law by state governments are of recent date, and the mode of its use is still a live question before the different courts.

To go deeply into each separate occasion of the use of martial law by the states would be long and tedious. It is best to confine the discussion to the most important occasions of its use and to those instances which have called forth some new concept.

One of the early instances of the use of martial law by a state government occurred in the State of Idaho, where martial law was used in the isolated Coeur D'Alene mining district both in 1892 and 1899.[1] In 1892 trouble broke out between the miners and mine owners over the employment of men obnoxious to the unions, dissatisfaction with wages, and other causes. In the outbreak that occurred in 1892, Governor Willey proclaimed martial law. State troops were sent in, and quiet was restored. The state undertook to prosecute a number of the strikers for murder, but the final result was that they all escaped punishment except certain minor punishments for contempt. A demand was immediately raised for the removal of the troops, it being alleged that quiet had been restored and that there was no longer any necessity for their presence. Martial law was thereupon revoked on November 18, 1892, and the troops were at once removed.

The trouble was not over, however, and from 1892 until 1899, when martial law again became necessary, there was a series of disturbances, murders and crimes, demonstrating the fact that during the entire period there was constant trouble. During this time the courts were so dominated by and the county officers were so in sympathy with the unions that convictions were impossible. The culmination of the trouble was reached in April, 1899, when men of different local unions joined together, commandeered a train, secured eighty pounds of powder, and journeyed to the Bunker Hill Mine where they destroyed mine property valued at $250,000. In the affray two men were killed, and one was wounded. According to the Report of the Committee on Military Affairs of the House of Representatives the whole affair was carried out with military precision and under direct command of chosen leaders.[2]

Upon being notified of the serious character of the disturb-

[1] See *Senate Documents,* 56th Cong. 1st Sess., Vol. 9, No. 142; *Senate Documents,* 56th Cong., 1st Sess., Vol. 4, Nos. 24 and 25. Also see *House Reports,* 56th Cong. 1st Sess., Vol. 7, No. 1999 (hereinafter cited as *Report of Investigation Committee*).

[2] *Ibid.* See especially the *Idaho State Tribune* account given on pp. 6 and 7.

ance, the Governor of Idaho sent a message to President McKinley requesting the aid of federal troops. Since the legislature was not in session, the duty devolved upon the Governor to put down revolt and to see that the laws were faithfully executed. The necessity for federal troops resulted from the fact that a large portion of the Idaho National Guard had volunteered for service in the Philippines and the Governor had no troops with which to meet the situation.[3] The President immediately directed that federal troops be sent as soon as possible to Shoshone County, the seat of the struggle. The command of the troops was given to General Merriam. At first the troops were used only to protect property and to detain the rioters who were trying to escape from the district, but upon the recommendation of General Merriam, Governor Steuenberg declared Shoshone County to be in a state of revolt and stated that martial law was in order.

The proclamation of the Governor was as follows:

> WHEREAS it appearing to my satisfaction that the execution of process is frustrated and defied in Shoshone County, State of Idaho, by bodies of men and others, and that combinations of armed men to resist the execution of processes and to commit deeds of violence exist in said county of Shoshone; and
>
> WHEREAS the civil authorities of the said county of Shoshone do not appear to be able to control such bodies of men or prevent the destruction of property and other acts of violence; . . .
>
> Now, THEREFORE, I, Frank Steuenberg, governor of the State of Idaho, by virtue of the authority in me vested, do hereby proclaim and declare the said County of Shoshone, in the State of Idaho, to be in a state of insurrection and rebellion.[4]

On the same day that the proclamation was issued the Governor sent a telegram to General Merriam asking him to have all fugitives, who were trying to escape, stopped. In the same telegram he notified the General that martial law was declared and for him to take the proper measures.[5]

[3] Message of Governor Steuenberg to the President (*ibid.*, p. 7).

[4] From the proclamation of the Governor, May 3, 1899 (*ibid.*, pp. 8-9).

[5] Telegram from Steuenberg to Merriam, May 3, 1899 (*ibid.*, p. 9; also in *Senate Documents*, 56th Cong. 1st Sess., Vol. 4, No. 24, p. 3).

Merriam was glad to receive the message, for he thought it better for the executive of the state rather than the commander of the troops to declare martial law. There was no necessity for a declaration of martial law by the President. The troops had been sent into Idaho on appeal from the Governor to put down insurrection and were under his orders to be used in the manner best suited to stop the revolt.

The Investigation Committee fully approved of the manner in which the troops were requested and the way in which they were used, and agreed that it was not an arbitrary use of federal troops.[6]

The purpose of the troops was to assist the civil authorities in making arrests and to act as guards both to the prisoners and to the mine property. General Merriam had strict orders to act only as aid to the state power. The exact status of the federal troops with respect to the state authorities was given in the Report of the Investigation Committee.

> When the United States Army is called upon to protect the State against "domestic violence," the military forces act in aid of the State authorities to the extent that the purpose is to reestablish the civil authorities; but the military forces of the United States are not under the command of the State authorities, but of the military officers, under the President. To this extent it is an independent force, operating under the order of the President to perform the guaranty imposed upon the United States by the Constitution.[7]

Thus the troops were in Idaho to aid the state government, but the number of troops to be used, the method of their use and their government depended alone upon the wish of the commander of the troops, and in last resort upon the President.

The Governor was forced to depend altogether upon the federal troops because he received little aid from the state and county officials. On the very day the Bunker Hill concentrator was blown up, the sheriff of Shoshone County assured the Governor that he could handle the situation without outside

[6] See syllabus of *Report of Investigation Committee,* pp. 1, 2.
[7] *Ibid.,* p. 2.

aid.[8] Later the sheriff, after a full hearing, was removed from office, and in the opinion of the court he was not only indifferent to the crimes that were taking place within his county, but was even an aider and abettor of them. The Report of the Committee on Military Affairs, showing the results of the investigation, stated: "The military force in Shoshone County, under command of General Merriam, was used strictly in aid of the civil authorities. The sheriff and other county officials were in collusion with the rioters, and therefore civil authority could not be enforced,"[9] all of which proved that the courts might be open, that the sheriff and his officers might still be in office, and yet that there might still be an insurrection of such an extent to make martial law necessary.

The number of men arrested and placed in detention camps amounted to nearly seven hundred. It was then impossible to try these men by civil courts, and the authorities did not wish to resort to punitive martial law. The prisoners therefore were held in detention until the civil courts could function in the right manner. Naturally, many of the men claimed that they were deprived of their personal rights guaranteed by the Federal Constitution, and they therefore applied to the civil courts for writs of habeas corpus.

The question whether the writ of habeas corpus was suspended arose. It was decided that the Governor by his declaration had not suspended the writ. The Governor himself stated that he had not suspended the writ and that, moreover, he did not have power to do so.[10] The opinion of the Investigation Committee was that "neither the governor nor any other authority had any right to suspend the writ and that no attempt was made to do so." Here was a case of martial law with no suspension of the writ. How could such an event occur and at the same time the use of martial law be effective? The civil courts solved this problem by refusing to issue any writs. The position of the court was questioned and later was passed upon by the Supreme Court of Idaho in the case of *In re Boyle*.[11]

[8] Text of the telegram from the sheriff to the Governor in *ibid.*, p. 13.
[9] *Ibid.*, p. 2. [10] *Ibid.*, p. 67. [11] *In re Boyle*, 6 Idaho 609 (1899).

In this case an application for a writ of habeas corpus was denied on the ground that the Governor was correct in his use of martial law in putting down insurrection, and that it was incorrect to say that the action of the executive, under such circumstances, was negated and set at naught by the judiciary.[12] The fact that the Governor had issued the proclamation was enough, and the court did not think that its duty was to inquire into the truth or falsity of the statements made in the declaration. The court held:

> The action of the governor in declaring Shoshone County to be in a state of insurrection and rebellion, and his action in calling to his aid the military forces of the United States for the purpose of restoring good order and the supremacy of the law, has the effect to put into force, to a limited extent, martial law in said county. Such action is not in violation of the constitution, but in harmony with it, being necessary for the preservation of the government. In such case the government may, like an individual acting in self-defense, take those steps necessary to preserve its existence. . . .[13]

The court said that, all the actions of the Governor being necessary and lawful, there should be no interference by the court in carrying out martial law. Therefore the writ was not granted. In this way the benefits of the suspension of the writ were accomplished without any direct suspension of the writ itself. The court, however, went further:

> We are of the opinion that whenever, for the purpose of putting down insurrection or rebellion, the exigencies of the case demanded for the successful accomplishment of this end in view, it is entirely competent for the executive or for the military officer in command, if there be such, either to suspend the writ or disregard it, if issued.[14]

This opinion did not agree with the decision reached by the Investigation Committee; nevertheless, it was good law. Really the reason why the writ of habeas corpus was not suspended was that there was no necessity for such suspension. But it could have been suspended, by the above case, if it had

[12] *Ibid.*, p. 612. [13] *Ibid.* [14] *Ibid.*, p. 611.

become necessary. So, regardless of whether all prisoners were refused a grant of the writ by the court, or whether recognition of the writ was refused by the military authorities when it was granted, the same end was accomplished.

An interesting possibility in any use of martial law was disclosed soon after the troops were stationed in the county. A few days after the appearance of the troops, rioting and disturbances ceased. As a result, the miners claimed that the Governor's proclamation of martial law was unjust and unnecessary and that now the county was everywhere quiet and peaceful. The people in authority in the state maintained that it was the presence of the troops alone that kept order, and the very statement of the miners that the insurrection was over showed with what efficacy the troops had been used. The only decision that could be reached concerning the continuance of martial law and the justification of its use, came from a close scrutiny of facts and conditions. Then only could the withdrawal of troops be effected so as neither to enrage the citizens nor to endanger the purpose for which they were used. An editorial in *The Outlook*, which discussed the use of martial law in Idaho, stated: "The question whether the Federal troops should be withdrawn is one to be settled, not by partisan interests, but by the fundamental principle on which our institutions rest. This principle, as embodied in our Constitution, is individual self-government . . . except when the interests of the Nation are imperiled."[15] This is, no doubt, a good general rule. The difficulty lies in its application.

The *Ex parte Milligan* case stated that martial rule could never exist where the courts were open and in the proper and unobstructed exercise of their jurisdiction. The use of martial law in Idaho was either contrary to this decision or else the Idaho case interpreted the *Milligan* case as meaning that the courts must not only be open but must also have an unobstructed exercise of their jurisdiction if martial law was not to be instituted. The last statement appears to be true.

There was at that time a tendency to break down the *Milli-*

[15] "Shall Martial Law Continue?" *The Outlook*, LXIV (April 14, 1900), 846.

gan decision and at the same time to bring forward a new mode of martial law. The new development was the use of troops under martial law but acting in co-operation with the civil authorities and civil courts. The beginning of this development was evident in the Idaho case, for martial law was not used there in a punitive sense. No person was tried by court-martial, and yet, according to the Governor's proclamation and the *In re Boyle* decision, martial law was in force.

The Committee of Investigation reported that "Martial law and the administration of justice by civil courts can proceed side by side in a community which is in a state of insurrection and riot when the courts cannot perform their proper functions without military protection."[16]

There was a growing demand that in cases like this, where the courts were open but intimidated, where the mandates of the court would not have been obeyed if issued, martial law should not depend on whether the courts were open, but on whether the courts functioned in the proper manner. Sometimes all that the courts needed was support. Sometimes the courts had reached so degenerate a condition that they had to be reconstructed. In both cases, martial law was the remedy. The use of martial law in Idaho was to restore order and to support the courts. It was claimed that without the protection and the influence of martial law intimidation of witnesses would have rendered all prosecution impossible and that the courts would have been made useless. This kind of martial law has been given various names; the most common are preventive martial law and qualified martial law. Qualified martial law is the use of martial law in civil disturbances not extending over a long period of time. It is a means of preserving order, while at the same time avoiding direct and gross interference with the private rights of each citizen. The use of qualified martial law has been due to the unwillingness of governmental authorities to use punitive methods in industrial disputes.

[16] *Report of Investigation Committee*, p. 2.

MARTIAL LAW IN PENNSYLVANIA IN 1902

The anthracite miners' strike in Pennsylvania in 1902 was one of the most serious of many labor troubles that had occurred in America. The repercussion was enormous in extent and affected, directly or indirectly, nearly every person in the United States. Nearly fifty thousand men quit work. As the supply of anthracite became greatly limited, and in many cases exhausted, the full realization of what such a strike might lead to was felt by all people. Thanks to the efforts of President Theodore Roosevelt, the strike was settled by arbitration and the industries of the United States soon returned to normal conditions. With such a large number of men out of employment and with the strike continuing for so great a time, one would expect serious rioting and the necessity for not only state but also federal troops. The Pennsylvania troops, however, handled the whole affair without outside aid, and in a much better manner than did the troops employed in the Colorado and Idaho labor troubles.

The strike commenced about May 12, 1902, and eventually extended over seven Pennsylvania counties including nearly all the anthracite coal region. The United Mine Workers of America was the labor organization behind the strike. The union stated that it was against violence of any kind, and its president, John Mitchell, used his influence to keep the miners within lawful bounds. But riots occurred in which people were killed and property was destroyed. The civil authorities became unable to preserve order, and asked the Governor for aid. At first the Governor called out a part of the militia as an aid to the civil authorities. Disorder, however, continued, and the "warfare" seemed to grow rather than diminish. The Governor was then forced to call out an entire division of the National Guard to keep the peace and to protect lives and property. At the same time he issued the following general order:

> In certain portions of the counties of Luzerne, Schuylkill, Carbon, Lackawanna, Susquehanna, Northumberland and Columbia, tumult

and riot frequently occur and mob law reigns. Men who desire to work have been beaten and driven away and their families threatened. Railroad trains have been delayed and stoned, and tracks torn up. The civil authorities are unable to maintain order and have called upon the Governor and the Commander-in-Chief of the National Guard for troops. The situation grows more serious each day. The territory involved is so extensive that the troops now on duty are insufficient to prevent all disorder. The presence of the entire Division, National Guard of Pennsylvania, is necessary in these counties to maintain the public peace. The Major General commanding will place the entire Division on duty, distributing them in such localities as will render them most effective for preserving the public peace. As tumults, riots, mobs and disorder usually occur when men attempt to work in and about the coal mines, he will see that all men who desire to work, and their families, have ample protection. He will protect all trains and other property from unlawful interference, will arrest all persons engaging in acts of violence and intimidation, and hold them under guard until their release will not endanger the public peace, and will see that threats, intimidations, assaults and all acts of violence cease at once. The public peace and good order will be preserved upon all occasions and throughout the several counties, and no interference whatsoever will be permitted with officers and men in the discharge of their duties under this order. The dignity and authority of the State must be maintained, and her power to suppress all lawlessness within her borders asserted.[17]

The exact force of this general order is hard to determine. Was it a proclamation of martial law, or was it just an order for the troops to support the civil authorities without any reference to martial law? Doubt was expressed upon this point, and, fortunately, the question came before the Supreme Court of Pennsylvania in the case of *Commonwealth* v. *Shortall*. The court held:

The issue of General Order No. 39 by the governor was a declaration of qualified martial law, in the affected districts. In so characterizing it we are not unmindful of the eminent authorities who have declared that martial law cannot exist in England or the United

[17] *General Order No. 39 of Governor of Pennsylvania, 1902. Report of Attorney-General of Pennsylvania, 1903-04,* pp. 383-384.

States at all, or at least, according to the most moderate advocates of that view, not in time of peace.[18]

Since the use of troops in Pennsylvania was similar to that in the Idaho case, it will be necessary to discuss and to develop only the new points, and the added significance that was given to martial law by its use in this instance. The case that arose at this time concerned Arthur Wadsworth, a private in the national guard. The decision substantiates the doctrine concerning the governor's power that was started in the *In re Boyle* decision. It also gives the first comprehensive definition of the term "qualified martial law." The last point made clear by the decision was the status of the soldiers in the militia with respect to civil law. The facts of the case are as follows: Wadsworth was a member of the national guard; he was placed on guard duty with instructions to shoot all persons who refused to halt on his command. An incident arose when a man refused to halt, and Wadsworth shot and instantly killed him. Great excitement resulted, and the whole neighborhood was aroused. The coroner's jury advised the district attorney to proceed against the soldier for killing the man. A warrant was sworn out against Wadsworth; Shortall, a constable and also the defendant in the case, tried to arrest him. The officer in command, acting on advice from the attorney-general of the state, refused permission to the constable to serve the warrant. The next step was to obtain a writ of habeas corpus directing the military officer to deliver the soldier to the civil authorities. The officer refused to obey the writ. Truce was then declared between the civil and military authorities, but a month later, when the troops were mustered out in Pittsburgh, Wadsworth was arrested by the civil authorities. The case was appealed to the Supreme Court of the state. The decision of the court was awaited with great expectation; it was hoped that it would give information upon the use of martial law and the power of the Governor in times of disorder.

The opinion of the court was that the Governor, as the Commander-in-Chief of the Militia, had the power to declare

[18] *Commonwealth* v. *Shortall*, 206 *Pa. State Reports* 165 (1903), p. 169.

martial law and to call out the troops. Moreover, according to the court, he was the person who had decided when this was to be done. Qualified martial law was established by the general order of the Governor.

Order 39 was as said a declaration of qualified martial law. Qualified in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose it was martial law with all its powers. The government has and must have this power or perish. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and security of the community as to life and property.[19]

The reason given by the court for this new form of martial law was that it was better suited for minor insurrections than punitive martial law. In the words of the court:

It is not unfrequently stated that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life and yet a state of disorder, violence and danger in special directions, which though not technically war, has in its limited field the same effect, and if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called. When the civil authority, though in existence and operation for some purposes, is yet unable to preserve the public order and resorts to military aid, this necessarily means the supremacy of actual force, the demonstration of the strong hand usually held in reserve and operating only by its moral influence.[20]

The court made clear that troops can be used in civil disturbances without recourse to martial law. The simple calling

[19] *Ibid.*, pp. 170-171. [20] *Ibid.*, p. 171.

out of the troops does not necessarily mean that martial law has been declared, for these troops may act in subordination to the county officials. Justice Mitchell stated that if

> The sheriff finds his power inadequate, he calls upon the larger power of the state to aid with the military. The sheriff may retain the command, for he is the highest executive officer of the county, and if he does so, ordinarily the military must act in subordination to him. But if the situation goes beyond county control, and requires the full power of the state, the governor intervenes as the supreme executive and he or his military representative becomes the superior and commanding officer.[21]

The lesson taught by this use of martial law is that the executive should be more explicit in his proclamation. He should state the type of martial law that he is declaring and outline the duties and powers of the military. When the proclamation is couched in ambiguous terms, not only is the military force uncertain concerning their powers, but the courts have difficulty in determining the exact nature of the martial law being used. If it should become necessary to alter the type of martial law, subsequent proclamations could be issued. Certainly much confusion and misunderstanding could have been avoided in this case and in many others if the executive had taken time to make his proclamation more explicit.

MARTIAL LAW IN COLORADO IN 1903-1904

"Since Fort Sumter was fired on nothing more ominous has happened in the United States than is now taking place in Colorado."[22] Such was the view of G. W. Gladden with respect to the labor trouble that occurred in Colorado in 1903-1904. The parties to the struggle were the railroad, smelting, and mining interests on the one hand, and the Western Federation of Miners on the other. The main strike was a sympathetic strike, for the miners themselves did not have any special grievances. Nevertheless, the contest between these two groups

[21] *Ibid.*

[22] For an account of the struggle see *Senate Documents,* 58th Cong., 3d Sess., Vol. 3, No. 122, pp. 31 ff.

resulted in pitched battles, wholesale arrests and deportations, martial law, and all the tragedies and suffering of a real war.

The seats of the disturbances were the Cripple Creek and the Telluride mining sections, the richest of the state. The union was particularly strong in these localities, for it had been victorious in previous encounters with the mine owners.

There were several reasons for the strike. In the first place, the strikers wanted every miner a union man. Another reason which was made much of by the miners was, indeed, one of the worst instances of political negligence. For the benefit of the miners in Colorado an eight-hour-day law had been passed. Since the Supreme Court of the state held this law unconstitutional, a constitutional amendment was proposed to make the eight-hour day legal. A legislature, whose expressed purpose was to pass the amendment, was elected by a substantial majority. When the legislature which was to pass this measure convened, for some unknown reason it failed to ratify the amendment.[23] The miners claimed that it was the influence of the mine owners. The operators, however, put the eight-hour day into effect in the mines. This measure did not extend to the men in the smelters. The smelter-men, thereupon, struck; the miners, to aid them, called a sympathetic strike. In such a manner did the strike begin.

Governor Peabody of Colorado, by his use of the militia, made a difference between the use of the militia as an aid to civil authorities and as a body of troops acting in the place of the civil authorities. In the former instance there was to be no use of martial law, while in the second, martial law was the crux of the whole situation. An illustration of the first type occurred in September, 1903, when the Governor ordered the militia to Cripple Creek and said in the order that the purpose of the troops was to prevent a threatened insurrection.[24] When the civil and military bodies clashed over the arrest of prisoners, the Governor said:

[23] See the account of the alleged facts in an editorial, "The Situation in Colorado," *The Independent*, LVI (June 16, 1904), 1396.

[24] Executive Order of Sept. 4, 1903 (*Senate Documents*, 58th Cong., 3d Sess., Vol. 3, No. 122, p. 176).

. . . you may be certain of one thing, and that is that no prisoner will be taken from the sheriff of Teller County, and I am inclined to think that no further attempt will be made.

Martial law has not been established in Cripple Creek, and it will not be. Under this condition, all that General Bell is supposed to do is to assist the civil authorities in preserving peace and order.[25]

This statement was not considered by the civil courts and by the state authorities to be an authorization of martial law, and no interference with the writ of habeas corpus was permitted.

In Telluride, however, conditions grew steadily worse. An army officer,[26] sent on a tour of investigation by President Roosevelt, called it plain insurrection. The Governor then issued a proclamation explaining that a condition existed in said county that bordered on absolute insurrection and rebellion.[27] The Governor's declaration was considered by state officers to be a proclamation of qualified martial law.[28] Martial law was also declared in the Cripple Creek section in December, 1903.

When interviewed concerning the Governor's proclamation, General Bell, who was the commanding officer in charge, observed:

It was the only thing left for the governor to do. The situation in Cripple Creek is mighty critical and the only way to put a stop to this continued crime is to put the district under the rule of the military.

"Martial law, then, exists?" inquired the reporter.

"To be sure," was the answer. "The military will have sole charge of everything and those whom the military think ought to be arrested will be landed in the 'bull pen.' If an order is issued to arrest all Socialists, they will be landed in the pen."

"How about Presbyterians?" inquired the reporter.

"They'll be thrown in, too, if an order is issued," was the reply.

[25] Interview with Governor Peabody as reported by the *Rocky Mountain News*, Denver (*Senate Documents*, 58th Cong., 3d Sess., Vol. 3, No. 122, p. 181).

[26] General John C. Bates.

[27] See proclamation of martial law in San Miguel County, Jan. 3, 1904 (*ibid.*, p. 198).

[28] When Governor Peabody withdrew his proclamation, he said, "[Let] further application of military authority be suspended" (*ibid.*, p. 223).

"The military is the whole works at Cripple Creek now, and it is for us to say who is to be under arrest."[29]

Martial law, however, was never carried to its full extent during this strike; it was used to about the same degree of severity as in the Coeur d'Alenes. No person was tried outside the civil courts, although the writ of habeas corpus was suspended.

The newspapers, especially those outside the state, condemned the use of martial law as carried on in Colorado. Public opinion in this case was with the strikers. The special cause of this support was the "deportations." Instead of waiting for trouble and then putting the person in jail, or of jailing men on suspicion, it was the custom, whenever a situation became critical, to deport all suspicious persons from the state. *The Independent* thought that this measure of the state government was too severe and that

> Force had been used without dignity and sometimes without justice or decency. The use of force was undoubtedly required, but it was possible so to employ it that the course of the authorities would inspire and deserve the respect of disinterested and civilized persons in other States. The acts of the Governor and his officers have too often suggested despotism and tyranny.[30]

It was not the use of martial law that was condemned, but the arbitrary use of power by the Governor and his officers. However, as long as there was reasonable doubt as to the necessity of the Governor's actions, it was practically certain that his actions would be upheld. Governor Peabody's course was condemned by the unions and by many reporters from out of the state, yet the support he received from the conservative press and the businessmen in the state was enough to save him. A contemporary writer stated: "The business community of Colorado has supported the Governor in all or nearly all

[29] Interview with General Bell (*ibid.*, p. 209).

[30] "The Situation in Colorado," *The Independent*, LVI (June 16, 1904), 1397. See also William E. Walling, "The Labor 'Rebellion' in Colorado," *The Independent*, LVII (Aug. 18, 1904), 376, and the opinion of Henry George, Jr., quoted in an editorial, "The Breaking-Down of Democratic Government in an American Commonwealth," *The Arena*, XXXII (Aug., 1904), 188.

his acts. It must share the praise or blame for what has been done. Governor Peabody could never have done what he has done without the support of the business element."[31]

An interesting case that arose out of the Colorado situation was that of *In re Moyer*.[32] Moyer was arrested by the civil authorities for desecration of the flag. He was released on bond, pending his trial. During this time he was arrested by the military authorities who refused to give him up to the civil power. The military officers claimed that he was arrested under express orders of the governor and that they were forced to disregard a writ issued by the civil court. The officers were ordered by Judge Stevens to be fined and jailed for contempt of court in disregarding the writ. A writ of supersedeas was granted to these two officers against the ruling of Judge Stevens while the Supreme Court was determining whether they were justified in disregarding the writ. The decision of the court did not go into the question of whether the governor had the power to declare martial law and suspend the writ, but held that Moyer, who was the head of the Western Federation of Miners, was lawfully arrested by the military authorities while the work of suppressing the insurrection was in progress. Therefore the military officers were justified in disregarding the writ.

The court believed:

> Laws must be given a reasonable construction which, so far as possible, will enable the end thereby sought to be attained. So with the constitution. It must be given that construction of which it is susceptible which will tend to maintain and preserve the government of which it is the foundation, and protect the citizens of the state in the enjoyment of their inalienable rights. In suppressing an insurrection it has been many times determined that the military may resort to extreme force as against armed and riotous resistance, even to the extent of taking the life of the rioters. . . . If, then, the military may resort to the extreme of taking human life in order to suppress insurrection, it is impossible to imagine upon what hypothesis it can be successfully claimed that the milder means of

[31] From W. E. Walling, *op. cit.*, p. 376. [32] *In re Moyer*, 35 Colo. 159 (1905).

seizing the persons of those participating in the insurrection or aiding and abetting it may not be resorted to. This is but a lawful means to the end to be accomplished. . . . Certainly such officials would be justified in arresting the rioters and placing them in jail without warrant, and detaining them until the riot was suppressed.[33]

The *American Law Review* commented on this decision:

The only substantial question for the consideration of lawyers which we see in the decision of the Supreme Court of Colorado is, Who is the final judge of the question whether an insurrection exists such as demands the exercise of the extraordinary measures which the Governor of Colorado has adopted? We believe that the decision of the Supreme Court of Colorado to the effect that the decision of that question rests with the Governor of the State, is right,—technically right, substantially right, profoundly right. The final decision of every question must rest somewhere. The Constitution and the laws of Colorado have committed this decision to the Governor. . . . It is a political question, and the responsibility of finally deciding political questions rests with the political department of the government and not with the judiciary.[34]

Moyer was not satisfied with this decision. He claimed that he was imprisoned without due process of law and that the privileges granted to him by the Fourteenth Amendment had been violated. He took his case to the Federal Circuit Court and finally to the Supreme Court of the United States. The Circuit Court found no abuse of power and no violation of the prohibitions of the Fourteenth Amendment.[35]

When the case reached the Supreme Court, Justice Holmes gave the opinion of the Court. He said that the Governor's declaration that a state of war existed was conclusive of that fact and that such a question was not entered into by the Court. Since the power was given to him to suppress revolts, he might do so as he thought best. His power of calling out the troops meant

[33] *Ibid.*, pp. 166-167.

[34] "The Colorado Labor War," *American Law Review*, XXXVIII (July-Aug., 1904), 572.

[35] *Moyer* v. *Peabody*, 148 Fed. 870 (1906).

. . . that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the Governor is the final judge and cannot be subjected to an action after he is out of office on the ground that he had no reasonable ground for his belief. If we suppose a Governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the Governor to a revision by a jury.[36]

Public danger warrants the substitution of executive for judicial process; and the ordinary rights of individuals must yield to what the executive honestly deems the necessities of a critical moment.[37]

Since it was the first case concerning martial law to reach the Supreme Court since the *Milligan* decision, it was hoped that a full exposition of the use and extent of martial law would be given. This decision, while upholding the use of martial law in the case before the Court, did not make clear any hard and fast rule concerning its exercise. It did state, however, that the governor could declare martial law in time of insurrection and that he was the sole judge of its use and extent. It is thus a substantiation of the *Boyle* and *Moyer* decisions.

In conclusion, it is unnecessary to comment upon the importance of these three uses of martial law. They supplement the *Luther* v. *Borden* decision, and, as the use of martial law by the state governments increases, so does their importance.

The use of qualified martial law and its sanction by the different courts are a most important development. Its use closely resembles the use of troops in England under the Riot Act, but the American courts prefer to call it qualified martial

[36] *Moyer* v. *Peabody*, 212 U. S. 78 (1909), pp. 84-85. [37] *Ibid.*, p. 79.

law. It simply means that troops can keep citizens in detention without regard to writs of habeas corpus or any interference from the civil forces. This detention may continue until the disturbance is over and the civil courts are again functioning in the proper manner.

With respect to the governor's power, all of the cases studied in this chapter have recognized his authority to institute martial law, to call out the forces, and to issue his proclamation whenever he thinks necessary. It is a political question and therefore belongs to the executive branch of the government.

In the Idaho case a new way of overcoming the conflict of martial law and the writ of habeas corpus was found. This method was for the civil courts not to grant any writs, and no question of whether the suspension of the writ was a legislative or an executive question would thus ever arise. The court justified its failure to grant a writ on the ground that the governor had proclaimed martial law and that this proclamation was conclusive upon the court. The detention of these men was considered by the court as a means of enforcing martial law.

The substantiation of the Governor's power by the Supreme Court in *Moyer* v. *Peabody* made the doctrine of the power of the governor apply to all the states. In this way a general rule was secured that could apply to the executives of the different states.

With the recognition of qualified martial law and the importance and power of the governor, martial law started upon a new line of development which extends to the present day.

Chapter VI

THE USE OF PUNITIVE MARTIAL LAW IN WEST VIRGINIA

THE ESTABLISHMENT OF MARTIAL LAW COURTS

IN THE HISTORY of the United States, martial law has never been used on so broad a scale, in so drastic a manner, nor upon such sweeping principles as in West Virginia in 1912-1913 during the Paint Creek trouble. Here the climax of the use by the state of its power to declare and to carry into effect martial law was reached. In other words, it was absolute martial law with all its force. Its use in this manner occasioned strenuous objections, not only from the participants in the strike, but also from the newspapers, the people outside the state, and to a great extent from the public in general. Many articles appeared in newspapers and magazines concerning its use; investigations were made by the State of West Virginia and by the United States Senate; decisions were rendered by the Supreme Court of West Virginia; and, all in all, it resulted in the most comprehensive discussion concerning the use of martial law and the manner of its exercise that has ever occurred in the history of the United States.

The controversy that resulted in the use of martial law was between mine operators and miners, and arose over attempts to organize labor. It lasted for about a year; its actual cost to the miners, operators, and state was nearly five million dollars.[1] The whole history of the disturbance reads like an account of open civil war. Pitched battles were fought, men were killed, and campaigns were entered upon, as if war had actually been declared. Martial law was used on three separate occasions, and it was not until the resources of the state were near exhaustion that the strike was settled and peace declared.

[1] "Peace in West Virginia," *The Survey,* XXX (Sept. 13, 1913), 709. The estimate is made on the basis of an examination made by the "Coal Age."

The Kanawha field, the location of the strike, was in the heart of West Virginia only a few miles from Charleston, the capital. The union had succeeded in organizing some of the mines upon Paint Creek, which was a division of the Kanawha field, but in other sections such as Cabin Creek it had failed. Early in the year 1912 the miners made demands upon the operators for higher wages, shorter hours, and better working conditions. Agreements were reached, and strikes were averted except in the unionized mines on Paint Creek. Here a strike was called, and both sides prepared for a long drawn-out fight.

Preparation for a strike in West Virginia at that time consisted of importing all the machine guns, rifles, and ammunition that could be obtained. Union agitators, scenting trouble, began to make their appearance. The operators, on the other hand, began to import mine guards whom the miners detested. As a result of the efforts of the agitators, the Cabin Creek section also declared a strike, and violence at once occurred. The sheriff, unable to restore order, called on the Governor for aid. Part of the militia was immediately sent into the district, and later the entire state militia was called out for active service in the Paint Creek section. Martial law was declared by the Governor on three distinct occasions, and troops remained in the strike zone long after the proclamations of martial law had been revoked.

On account of the serious nature of the dispute and of the methods used by the state government to control the situation, investigations were ordered not only by the Governor but also by the United States Senate. The purpose of the Senate investigation, according to Senator Martine, was ". . . to get the facts, with the hope that we may let God's sunlight in, and that you may all, as a Commonwealth, be better, and the country, as a whole, be better by that which may be portrayed."[2] The state authorities objected to the Senate investigation because they considered the question whether the state had overstepped its

[2] Senator Martine, *Senate Hearings on Conditions in the Paint Creek District of West Virginia, pursuant to Senate Resolution No. 37*, 63d Cong., 1st Sess., I, 174 (hereinafter cited as *Hearings*).

power one for the Supreme Court to decide, and not the United States Senate.

The Investigation Committee, a subcommittee of the Committee on Education and Labor of the Senate, consisted of Senators Shields, Martine, Kenyon, Borah, and Swanson, the last of whom was the chairman of the Committee. The Committee purposed to investigate peonage, the importation of firearms, interference with the mails, the disregard of the immigration laws, unlawful combinations, and, most important, to investigate and report all the facts and circumstances relating to the charge that citizens of the United States have been arrested, tried, and convicted contrary to or in violation of the Constitution or the laws of the United States.[3] The results of the investigation have been utilized in the ensuing narrative.

On September 2, 1912, the Governor issued the following proclamation:

> WHEREAS great public danger to life and property has for some time past and now exists, . . . unlawful assemblages of armed persons have congregated. . . .
>
> WHEREAS said sheriff commanded the said persons unlawfully assembled to disperse . . . remained in armed resistance to the enforcement of the laws by the civil officers . . . etc. Now, therefore,
>
> I, William E. Glasscock, governor of the State of West Virginia, and as such governor ex officio commander in chief of the military forces of the State, in view of the foregoing, and in order to execute the laws, and to protect the public peace, lives, and property of quiet and orderly citizens, by virtue of the Constitution and laws of the State, do hereby declare and proclaim a state of war to exist in the district of Cabin Creek, in the county of Kanawha and State of West Virginia. . . .
>
> And I do hereby further declare and proclaim that said territory is and shall remain under martial law until the necessity therefor ceases to exist.[4]

The real purpose of the declaration of martial law was to restore peace by ridding the strike zone of the mine guards,

[3] Senate Resolution, No. 37, 63d Cong., 1st Sess., *Congressional Record*, L, Part I, p. 164, April 12, 1913.

[4] Proclamation of Sept. 2, 1912 (see *Hearings*, I, 78).

who were the actual cause of the violence and whom the miners hated intensely. When Governor Glasscock was called before the Investigation Committee, the following point was raised:

Sen. Borah: "Right there, as I understand, you declare martial law in that district in order to enable you, as governor of this State, to get those mine guards out of the territory and to prevent them from exercising police powers, which they had no right to exercise."

Gov. Glasscock: "That was one of the reasons."

Sen. Borah: "Was not that the controlling reason for your declaration?"

Governor Glasscock: "I expect, Senator Borah, it did have more influence with me than any other."[5]

Peace was not restored under martial law until a military court was established, the mine guards removed, and the mine operators and miners disarmed. The last was no small undertaking, for the militia obtained from both sides between 1,800 and 1,900 guns, about 450 revolvers, 6 machine guns, and about 175,000 rounds of ammunition.[6]

Martial law was revoked in October, but was again called into use when the operators attempted to import strikebreakers. When peace was again restored, Governor Glasscock did not publicly announce that martial law had been discontinued. Before the Investigation Committee he explained his actions thus:

. . . for the reason that if those people up there believed there was martial law I would be able to maintain peace and order without anything further, and we had peace then from the time that was lifted until about the 7th of February. . . . I thought I was justified in evading the question and not answering the question directly, because I could keep peace up there by simply leaving the impression upon the minds of these people that there was martial law when there was no martial law; that I was doing a service and justified in that much deception.[7]

The third intervention with martial law was similar in detail to the two previous instances: military courts were again established, and also the absolute type of martial law was used.

[5] *Ibid.*, p. 377.

[6] The estimate of Governor Glasscock (*ibid.*, p. 393).

[7] *Ibid.*, p. 396.

At the very beginning of a discussion of this use of martial law it is necessary to see just what limitations are placed upon its use by the West Virginia Constitution, or whether its use is permitted at all. Article 1, Section 3 of the Constitution of West Virginia states: "The provisions of the Constitution of the United States, and of this State, are operative alike in a period of war as in time of peace, and any departure therefrom or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."

Article 3, Section 4, reads:

> The privilege of the writ of habeas corpus shall not be suspended. No person shall be held to answer for treason, felony, or other crime, not cognizable by a justice, unless on presentment or indictment of a grand jury.

Article 3, Section 12, reads:

> The military shall be subordinate to the civil power; and no citizen, unless engaged in the military service of the State, shall be tried or punished by any military court for any offense that is cognizable by the civil courts of the State.

On the other hand, the Constitution stipulates that "The Chief Executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed";[8] and Section 12 states: "The Governor shall be Commander-in-Chief of the military forces of the State, and may call out the same to execute the laws, suppress insurrection and repel invasion."

Section 1230 of the Code of West Virginia further provides that

> When any portion of the military forces of this State shall be on duty—in time of war, insurrection [or] invasion—the rules and articles of war and the general regulations for the government of the army of the United States shall be considered in force and regarded a part of this article. . . . In the event of invasion, insurrection, rebellion or riot, the governor may in his discretion declare a

[8] Art. 7, Sec. 5, *Constitution of West Virginia.*

state of war in the towns, cities, districts or counties where such disturbances exist.

In discussing the question of the influence of the Constitution upon the use of martial law Senator Borah stated: "I have not any doubt about the power of the governor to declare martial law. But what he may do after martial law is declared is another question."[9] The Supreme Court of West Virginia believed not only that the governor had power to declare martial law, but also that he had used lawful measures to carry it into effect.

STATE EX REL. MAYS V. BROWN

From the legal standpoint the most important phase of the use of martial law in West Virginia is furnished by the decisions which were rendered by the Supreme Court of West Virginia. While these cases were real cases in one sense, yet in another sense they were test cases, because when prisoners were tried before the military court, they made no defense, with the expectation that after sentence they would ask for a writ of habeas corpus, and in this way test the legality of the military tribunals. As one of the prisoners put the matter,

> . . . if we let them get away with it, then in the future wherever and whenever the interests of the working class and the capitalist class reach an acute stage, out will come the militia, the courts will be set aside, and the leaders railroaded to the military bull-pens, and thence to the penitentiaries. Here lies the great danger.
>
> This case can not now be settled until it has reached the bar of the nation's conscience. In order to do this, the sleepy old public must have another victim. We boys have made up our minds to go to the pen; this will give the lawyers a ground to test the case before the Supreme Court and we will trust to our comrades to keep up the agitation.[10]

Actions were brought in both the federal and state courts. In the federal court, Judge Littlepage of the Circuit Court maintained that a federal judge had no right to interfere with

[9] *Hearings*, p. 407.

[10] Letter of John Brown to wife (*The Literary Digest*, XLVI, April 5, 1913, p. 756).

courts-martial duly organized under the laws of the state. Thereafter the only hope of the miners was the Supreme Court of West Virginia. The three famous cases decided by this court were the *Nance* and *Mays* case, usually referred to as *State* v. *Brown, In re Mary Jones*, and the case of *Hatfield* v. *Graham*.

The facts of the case of *State* v. *Brown*[11] are as follows: Nance and Mays were sentenced to the state penitentiary by the military commission. They sought discharge from the warden, M. L. Brown, through writs of habeas corpus duly issued by the Supreme Court of Appeals of West Virginia. They demanded discharges from custody through "lack of authority in the governor to institute, in cases of insurrection, invasion and riot, martial law." A further contention was that his power to do so extended only to the inauguration or establishment of a limited or qualified form of such law, subordinate to the civil jurisdiction. Certain provisions of the state constitution were relied upon as working this restraint upon the executive power, among them the provisions of Sections 4 and 12 of Article 3, which were quoted above. A minor question was whether offenses committed immediately before the proclamation of martial law, but connected with the insurrection and operative therein, were punishable by a military commission acting within the period of martial occupation and rule.

In giving the opinion of the court, Justice Poffenbager held that the governor of a state had the power to institute martial law as a necessary incident to his sovereign powers. What effect did the habeas corpus clause of the Constitution and the other measures that appeared to restrict this power of the governor, have upon it? The opinion maintained that

> The provisions against the suspension of the writ of *habeas corpus* and trial of citizens by military courts for offenses cognizable by the civil courts cannot, in the nature of things, be actually operative in any section in which the Constitution itself and the functions of the courts have been ousted, set aside, or obstructed in their operation by an invasion, insurrection, rebellion or riot. . . .

[11] *State* v. *Brown*, 71 W. Va. 519 (1912).

There is no court with power to grant or enforce the writ of *habeas corpus* within the limits of such territory. There is no court in which a citizen can be tried, nor any whose process can be made effective for any purpose. No doubt the Constitution and laws of the State are theoretically or potentially operative, but they are certainly not in actual and effective operation. The exercise of the military power, disregarding for the time being the constitutional provisions relied upon, is obviously necessary to the restoration of the effectiveness of all the provisions of the Constitution, including those who are said to limit and restrain that power.

To ascertain the extent and purpose of the incorporation of these restrictive provisions of the Constitution, they must be read in the light of principles developed by governmental experience in all ages and countries and universally recognized at the date of the adoption of the Constitution and not expressly abolished or precluded from operation by any terms found in the instrument. . . .

The guaranties of supremacy of the civil law, trial by the civil courts, and the operation of the writ of *habeas corpus* should be read and interpreted so as to harmonize with the retention in the executive and legislative departments of power necessary to maintain the existence of such guaranties themselves. It is reasonable and logical. Otherwise the whole scheme of government may fail.[12]

The court said that the governor had the power to institute martial law and that his actions, taken by virtue of such proclamation, were not reviewable by the courts. The opinion reads:

It seems to be conceded that if the governor has the power to declare a state of war, his action in doing so is not reviewable by the courts. Of the correctness of this view, we have no doubt. The function belongs to the executive and legislative departments of the government, and is beyond the jurisdiction and powers of the courts. There is room for speculation, of course, as to the consequences of an arbitrary exercise of this high sovereign power, but the people, in the adoption of their Constitution, may well be supposed to have proceeded upon a well-grounded presumption against any such action, and assumed that the evil likely to flow from an attempt to hamper and restrain the sovereign power in this respect might largely outweigh such advantages as could be obtained therefrom. We are not to be understood as saying there would be a

[12] *Ibid.*, pp. 522-523.

lack of remedy in such case. The sovereign power rests in the people and may be exerted through the legislature to the extent of the impeachment and removal from office of a governor for acts of usurpation and other abuses of power.[13]

The syllabus of the case further stated that executive acts are not reviewable by the courts "while the military occupation continues,"[14] and the opinion is very positive in its statement that it is only through impeachment that a governor may be punished while in office.

Nor did Justice Poffenbager's opinion limit the governor's power to qualified martial law; on the contrary, it recognized in him full power to establish punitive martial law. On this point the opinion reads:

> Power to establish a military commission for the punishment of offenses committed within the military zone is challenged in argument; but we think such a commission is a recognized and necessary incident and instrumentality of martial government. A mere power of detention of offenders may be wholly inadequate to the exigencies and effectiveness of such government. How long an insurrection or a war may last depends upon its character. Such insurrections as are likely to occur in a state like this are mild and of a short duration. But no man can foresee or foretell the possibilities, and a government must be strong enough to cope with great insurrections and rebellions as well as mild ones.[15]

Answering a claim based on the *Milligan* decision that, as the civil courts were open in Kanawha County, martial law could not have been lawfully instituted, the court, continuing its very drastic opinion, maintained that, although there were courts open, both inside and outside the military zone, this fact did

> . . . not preclude the exercise of the powers here recognized as vested in the executive of the state. These petitioners were arrested within the limits of the martial zone. There the process of the courts did not and could not run during the period of military occupation, and presumptively the state of affairs in that district, at the time of the military occupation and immediately before, was such as to

[13] *Ibid.*, pp. 524-525. [14] *Ibid.*, p. 519. [15] *Ibid.*, p. 525.

preclude the free course and effectiveness of the civil law and the process of the court, however effective they may have been in other sections of Kanawha County.[16]

The decision is certainly one of the most radical ever given by an American court concerning martial law. The governor's authority was stretched to the very limit, and martial law in all its power could be established whenever the executive thought necessary. At the same time the liability of the governor for this and subsequent actions was made comparatively negligible.

A dissenting opinion was given by Justice Robinson, who disagreed with the majority upon each important point. It merits consideration, for it is the first judicial utterance which limits the governor's power simply to the declaration of qualified martial law.

He expressed his disagreement with the majority opinion because it "boldly asserts that the sacred guaranties of our State Constitution may be set aside and wholly disregarded on the plea of necessity."[17]

Justice Robinson also denied to the governor the right to declare punitive martial law because it would deprive citizens of jury trial.

By the power of the militia he may, if the necessity exists, arrest and detain any citizen offending against the laws; but he can not imprison him at his will, because the Constitution guarantees to that offender trial by jury, the judgment of his peers. He may use military force where force in disobedience to the laws demands it; but military force against one violating the laws of the land can have no place in the trial and punishment of the offender. The necessity for the use of military force is at an end when the force of the offender in his violation of the laws is overcome by his arrest and detention.[18]

[16] *Ibid.*, p. 525.

[17] *Ibid.*, p. 527.

The Constitution of West Virginia states that "The provisions of the Constitution of the United States and of this state are operative alike in a period of war as in time of peace, and any departure therefrom, or violation thereof, under the pleas of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism" (Art. 1, Sec. 3, *Constitution of West Virginia*).

[18] *State* v. *Brown*, 71 W. Va. 519 p. 534 (1912).

Indeed, according to this opinion, martial law can never rest on governmental authority. "A declaration of war is not a declaration of martial law. The mere presence of war does not set aside constitutional rights and the ordinary course of the laws. Civil courts often proceed in the midst of war. . . . Martial law rests not on constitutional, congressional, or legislative warrant; it rests wholly on actual necessity. Nothing else can ever authorize it. And that necessity is reviewable by the courts."[19] At this point it would seem that Justice Robinson's opinion had become inconsistent. He had first stated that constitutional guaranties could not be set aside on the plea of necessity as the majority had maintained. Later in the opinion, however, he stated that martial law rested on necessity alone and not upon constitutional, congressional, or legislative warrant, and he concluded by saying: "One gross error of that [the majority] decision is that it bases the right to martial law solely on the decision and proclamation of the Governor and not on *actual* necessity. No mere decision or proclamation can justify martial law, even when it might be legally recognized. It can only be justified by the absolute necessity of fact for it."[20] These statements seem contradictory, and the real difference between the majority and minority opinions is, after all, that one considered that there was an actual necessity while the other did not.

The dissenting opinion followed the *Milligan* decision in stating that, since the civil courts of Kanawha County were open, martial law could not be instituted. Even the majority admitted that some of the civil courts were open, and the minority claimed that

> We know by the record of these cases, we know judicially, that they could have been so tried. But an answer that is attempted is this, that the Governor by his proclamation had set off the portion of the county in which the offenses were committed and the offenders were arrested, as a martial law district. Again we say the mere proclamation could not alone make the necessity. The physical status must make it. . . . Those disturbances had not interrupted

[19] *Ibid.*, p. 535.

[20] *Ibid.*, pp. 540-541.

the very court that would have tried them if there had been no such disturbances. . . . The militia must aid the courts, not supplant them. Both are created by the same Constitution. They belong to the same people. They must work in harmony as the people contemplated when they established both.[21]

For these many reasons Justice Robinson was forced to dissent. He summed up his opinion in one brief sentence: "No court ever before upheld the action of a governor in ousting the courts of their jurisdiction as to civil offenses and in substituting himself therefor."[22]

The majority, after reading this dissenting opinion, thought it necessary to adopt the rather unusual practice of giving an additional opinion upon the same case. It was an attempt to reconcile precedent with their decision and at the same time to show that the authorities relied upon by Justice Robinson were writers upon martial law alone, and that the cases he had quoted were misconstrued. In the words of Justice Poffenbager:

> The attempt, in the dissenting opinion prepared since the filing of the Court opinion, to apply to these cases principles deemed clearly inapplicable by all concurring in the decision, renders it proper, in our judgment, to file an additional opinion, pointing out more specifically the grounds of distinction, and also to direct attention to the nonjudicial and speculative character of much of the matter quoted in the dissenting opinion.[23]

The real point of difference between the two opinions resulted from their different ideas of what constituted a state of war. While this difference continued, both sides could quote the *Milligan* decision with perfect equanimity. The minority opinion considered Kanawha County in the same position as Indiana in the Civil War; therefore, martial law could not be instituted. The majority opinion considered Kanawha County in a state of war; therefore, by the *Milligan* decision martial law could be used. The majority opinion considered the provisions in the West Virginia constitution in perfect

[21] *Ibid.*, pp. 543-544. [22] *Ibid.*, p. 550. [23] *Ibid.*, pp. 551-552.

harmony with the use of martial law in the state of war: "Constitutional and statutory provisions are always to be interpreted in the light of the evils they were obviously designed to remedy, and do not, as a rule, extend beyond such purpose. No other rule of interpretation is more firmly established or more generally recognized. It is a rule of common sense."[24]

The additional opinion, after it had criticized the dissenting opinion for the use of the "mass of quoted matter therein from public writers,"[25] retracted from a rather dogmatic statement made in the opinion proper as to the liability of the governor in his use of martial law. The former statement was qualified in this manner:

> While the executive and his subordinate officers are engaged in the suppression of an insurrection, there is no power in the courts to restrain them, though there may be, after the war is over, a right of action for damages for some wrongful act, done in the exercise of the power.[26]

In conclusion, the court, while admitting that the insurrection in West Virginia was hardly a circumstance as compared to the Civil War, yet held the same rules to govern the use of martial law in both cases and that the same questions were at stake in both cases.

The opinion stated that in dealing with grave questions such as this:

> . . . we must govern ourselves by settled rules and principles of law, including the rules of construction and interpretation. It is not permissible to set aside or ignore them in trivial cases. The greater the moment of the question or matter involved, the greater the reason for strict adherence to law and observance of distinctions in the application of principles and precedents.[27]

EX PARTE MARY JONES

The case of *Ex parte Jones,* which arose three months after the *Brown* case, was similar to the *Brown* case, and the courts' opinions in the two cases were similar. In the meantime, how-

[24] *Ibid.*, p. 554. [25] *Ibid.*, p. 564. [26] *Ibid.* [27] *Ibid.*, p. 567.

ever, the court had examined more closely the history of martial law. The opinion included an elaborate history of martial law with quotations which in the mind of the court substantiated its own interpretation. It is unnecessary to go into this mass of quotations; suffice it to say, it was held that "the principles and conclusions of law announced in *State ex rel. Mays* v. *Brown,* and *State ex rel. Nance* v. *Brown, Warden,* having been re-examined, after thorough argument and consideration, are approved and reaffirmed."[28] The question, however, had been raised whether punitive martial law was contrary to the due process of law clause in the Federal Constitution. On this point the court asserted that it saw

> . . . no reason for saying it violates, in any respect, any of the constitutional guaranties. It is statutory authority in the governor, and if not in violation of the Constitution, it amounts to due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States. It contemplates imprisonment without trial by jury, but not by judgment of conviction of a crime. The exercise of this power involves no change of status from citizens to convicts. It is, therefore, not a deprivation of liberty without a trial by jury, within the meaning of the constitutional guaranties.[29]

Its justification is placed upon the same grounds that permit judges to punish for contempt of court, and it is therefore independent of the due process of law clause. The governor has the statutory power which is not in violation of the Constitution. Therefore it amounts to due process of law as stated in the Fourteenth Amendment of the Constitution of the United States.[30]

[28] *Ex parte Jones,* 71 W. Va. 567 (1913). [29] *Ibid.,* p. 608.

[30] This is the same ground upon which the Supreme Court justified the arrest and deportation of aliens in the case of *Fong Yue Ting* v. *United States,* 149 U. S. 698 (1893), p. 730. The Supreme Court said in that case: "The proceeding before a United States judge, as provided for in Sec. 6 of the Act of 1892, is in no proper sense a trial and sentence for a crime or offence. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his

In this case Justice Robinson was again forced to dissent. He considered his arguments in the previous case to be still intact despite the majority opinion. He reiterated all his former conclusions, but in this reiteration made a point, which has been developed in more recent cases, as to the difference between war and insurrection. His words were:

> The failure of the majority opinion to observe the sharp distinction between public war and civil disorder, between enmity against the State and individual enmity between citizens of the State, between rebels and mere violaters of the law, between belligerent territory and territory retaining allegiance, accounts for the misapplication of the decisions, legislative enactments, and quotations. . . . They relate to public war and to public enemies. We are not dealing with public war or public enemies. . . .
>
> Military commissions have existed in public wars,—in conquered enemy countries. But no military commission for the trial of citizens, usurping all criminal jurisdiction of the courts, has ever before been sanctioned or recognized as to a state militia in the quelling of domestic disorder.[31]

It will be shown later how this point has been developed and how this minority opinion of Justice Robinson has influenced other courts.

HATFIELD V. GRAHAM

The use of martial law in West Virginia resulted in another case[32] which settled the question of the responsibility of the governor of West Virginia for his actions, broadened the conception of due process of law, and extended the governor's power, not only over the proclaimed zone, but anywhere in the State whenever any influence was brought to bear that

own country of an alien who had not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through its proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

[31] *Ex parte Jones*, 71 W. Va. 567 (1913), 619.

[32] *Hatfield* v. *Graham*, 73 W. Va. 759 (1914).

directly affected the insurrection, regardless of whether the civil courts were open. It is a continuance of the previous doctrine of this same court; its importance rests in its consideration of the governor's position.

The facts of the case are as follows: Governor Hatfield, who was the successor of Governor Glasscock, ordered, in the furtherance of martial law, some of the officers of the militia to close a newspaper office in Huntington, West Virginia, where a paper called *The Socialist and Labor Star* was being published. Huntington was outside the martial law zone, but the Governor claimed that the newspaper was aiding and abetting the insurrection. The respondents admitted that the paper had about twenty subscriptions in the war zone, but they thought that the Governor's action in suppressing the paper and closing the shop was unnecessary and unjust. Action was brought against the Governor and his subordinates in the Circuit Court, but the Governor applied to the Supreme Court of Appeals, requesting that a writ of prohibition be issued to prohibit Judge Graham of the Circuit Court from entertaining jurisdiction of the case.

The decision of the Supreme Court, which upheld the Governor in all his actions, was given this time by Judge Williams. It was the opinion of the court that "the governor of the State can not be held to answer in the courts in a civil action for damages resulting from the execution of his lawful orders or warrants issued in good faith in discharge of his official duties.[33] His proclamations, warrants and orders made in the discharge of his official duties are as much due process of law as the judgment of the court."[34]

The court thought that if the above doctrine were not true the results would be the undermining of one of the fundamental rules of the Constitution. The opinion continued:

> The fundamental idea underlying our federal and state systems of government is a division of powers among the three branches thereof, the executive, the legislative, and the judiciary. Every one of these is made as independent of the other two as it was thought

[33] *Ibid.*, p. 765. [34] *Ibid.*, p. 759.

wise and practicable by the framers of our constitutions to make them. The official acts, orders and proclamations of the chief executive, made within the scope of his constitutional powers, are no more subject to review by the courts than acts passed by the legislature. It follows from the very nature and constitution of our government, and from the character of the powers and duties with which it has clothed the chief executive, that he must determine for himself the necessity for the exercise of such power as is vested in him. . . . Within his constitutional duties and powers he is supreme. Like any other officer of the state, he is liable to impeachment in the manner provided by the Constitution. . . . But there is no other manner of reviewing his official conduct. If the courts could, while the governor is in office, review his official acts and proclamations and pronounce them illegal, then the judiciary, and not the governor, would be the chief executive power in the State.[35]

The court admitted that the exercise of power by the governor would not be permitted in peace time. However, under existing conditions, which amounted to a domestic war, such action was justifiable:

The necessity for the act is its justification, and the governor had the discretion to determine whether the necessity therefor existed, and having had cause to believe that the necessity did exist, the courts have no power to review his discretion and pronounce his warrant or command unlawful, as being in excess of his constitutional power. True it is that our's is a government by the people, but it must also be remembered that it is a government by laws and that the people have delegated, for the time being, their power to faithfully execute the laws to their chief executive and have, by their constitution, clothed him with the requisite power to do so. Of course, the governor must act in good faith; he can not injure the person or property of a citizen unnecessarily, wantonly or maliciously, even under color of his high office; and when his act is justifiable, as in the present case, only on the ground of public necessity, he must have reasonable ground to believe that the necessity therefor exists. But the facts constituting the grounds for his belief must be viewed from his standpoint and in the light of the exigencies as they appeared to him, because he is compelled to judge of their sufficiency in the first instance and, unless his belief is

[35] *Ibid.*, pp. 765-766.

wholly unfounded, the legality of his act is unquestionable. Where there is ground for his belief the court can not substitute its judgment for his. The necessity for his act makes it both lawful and "due process" within the meaning of the Constitution of the United States.[36]

By virtue of this opinion, the governor could institute martial law anywhere within the state, whether within or without the prescribed zone, whenever he thought necessary. In this case the printing plant was located in Huntington, West Virginia. The court, however, maintained that the fact that the

> . . . respondent's plant was at a point in the state remote from the martial zone did not limit his power, as the military commander-in-chief, to stop the issue of the paper which he had good reason to believe was antagonizing him and encouraging further disorder. His power, military as well as civil, is co-extensive with the boundaries of the State. A person outside of the military cordon might be able to do more mischief than one within, and it would be irrational to say that the governor has no authority to prevent it.[37]

And "Having reason to believe that the exigencies of the situation justified the suppression of the paper until order was restored, the governor's action can not be reviewed by this court."[38]

The gist of the opinion is that, so long as there is a disturbance in any part of the state that justifies martial law, the governor can extend martial law to any portion of the state in order to eliminate interference with its administration. The other conclusion reached by the court was that, so long as the governor acted in good faith, his actions and the actions of his subordinates were not reviewable by the courts. He could be reached only by impeachment.

Judge Robinson was again forced to dissent; especially so, since this doctrine extended martial law from a proclaimed zone, as was stated in the *Brown* and *Jones* cases, over the whole State. He concluded his opinion by saying:

> The unsound principle established by this decision permits a Governor to deal with private rights and private property as he

[36] *Ibid.*, p. 767. [37] *Ibid.*, p. 768. [38] *Ibid.*, p. 773.

pleases. He has only to answer that he does so officially, and an action, though alleging facts showing that his act is wholly without his political province, will be prohibited. Such a view is wholly un-American, and inconsistent with constitutional government.[39]

In conclusion, there is no doubt that the type of martial law used in West Virginia was *real* in that the Supreme Court of West Virginia held that the governor had the power to declare, not only qualified martial law, but also punitive martial law and to establish tribunals for the trial of civilians; that the decisions rendered by this court upheld the findings of the military court as obtained by due process of law and that, consequently, none of the constitutional guarantees were interfered with; that the governor's power to institute martial law extended beyond the proclaimed zone all over the state and that he could use it whenever he thought necessary; finally, that these actions of the governor were not reviewable by the civil courts so long as the governor acted in good faith and that "unless his belief is wholly unfounded, the legality of his act is unquestionable."[40] Such is the strongest substantiation ever given by a court to the use of martial law. It could have gone no further.

THE FINDINGS OF THE SENATE INVESTIGATION COMMITTEE

The same question that arose before the Supreme Court of West Virginia came before the Senate Investigation Committee. From the report of these hearings one may obtain a clear insight into the details of the use of martial law in West Virginia.

Concerning the use of martial law, the important point considered by the Senate Investigation Committee was the establishment of military courts for the trial of civilians. There was great doubt as to the constitutionality of this method of procedure, which had not been attempted since the Civil War. Military courts were established under each declaration of martial law, and over two hundred civilians came before them.

[39] *Ibid.*, pp. 775-776.

[40] *Ibid.*, p. 767.

The men who were tried before these tribunals were arrested by order of some military officer upon charges formulated before the judge advocate general, and the arrest was made by serving a copy upon the party charged and taking him into custody. That is to say, they were brought before this military court by virtue of the specifications served upon them and not by any civil process issued by any common law or civil court. The parties charged were given time to get their witnesses and counsel, but the courts proceeded wholly and exclusively upon what was deemed to be military authority, and under the military law and not under the civil law.[41]

When he was before the Investigation Committee, Colonel Wallace, the Judge Advocate General, claimed that the civil law of the state had already been suspended and that the military courts were justifiable because of the fact that every sovereign state had within itself the inherent power to preserve itself from its foes, from within as well as from without.[42]

The Governor of the state considered the establishment of these military courts as coming within the power to declare martial law. Before the Committee he was questioned as follows:

Mr. Belcher. Yes; I mean they could recommend a death penalty?

Gov. Glasscock. Yes, they could recommend anything they wanted to.

Mr. Belcher. And, of course, if you, as commander in chief, approved it, then of course it could be carried out?

Gov. Glasscock. Yes.

Mr. Belcher. And you deem that legal?

Gov. Glasscock. I think that the will of the commander in chief was supreme under martial law. In other words, if martial law means no law but the will of the commander then the will of the commander is supreme.[43]

The most novel solution of the question concerning the position of the state constitution during the continuance of

[41] From Report of Senator Borah to Chairman of Sub-Committee on Court Martial Trials (Senate Report, 63d Cong., 2d Sess., No. 321, p. 6).

[42] *Hearings*, I, 246-264.

[43] *Ibid.*, p. 405.

martial law was given by Colonel Wallace. When asked if the proclamation of the Governor suspended the constitution and all law, he replied:

I did not say that he suspended the Constitution. I say that he recognized the condition and went there to restore the Constitution, if you please.

Mr. Belcher. After it had been destroyed?

Col. Wallace. After it had been overthrown, not destroyed.

Mr. Belcher. Where was it at the time, the Constitution—during the time it was suspended?

Col. Wallace. I haven't any idea. It is like a man with suspended animation. I do not know where it was. It was somewhere in space.[44]

Notwithstanding this testimony, the Investigation Committee doubted the opinion that the governor and his subordinates had the power constitutionally to establish military courts for the trial of civilians.

The military courts were established by order of the Governor. The order stated that the military court was to take over all criminal courts in the martial law district and that it could impose any sentences that the military commission desired.

The sentences imposed by the court extended from one day to seven and a half years. No person was tried for murder. It is an interesting fact that all the persons sentenced to a term in jail were pardoned by the Governor as soon as the disturbance was over and peace was declared. The Governor himself stated that the sentences were imposed more for intimidation than for any other reason and that the pardons were given out according to a predetermined plan.

The military officers who composed the different tribunals claimed that, while they were not bound by any law or limited by law as to the length of the prison sentences imposed by them, yet they tried to make their sentences conform as nearly as possible to similar ones inflicted by the civil courts. They maintained also that all the prisoners had had a fair trial, that

[44] *Ibid.*, p. 246.

witnesses had been used as in civil cases and that, all in all, the trial received had been just and had been not an arbitrary use of power. Notwithstanding these self-imposed limits, the courts claimed that there was no limit to their power if they had desired to exert it.

Conflicting testimony was given as to the method in which the tribunals conducted the trials. Nance, who received a heavy sentence, claimed that he did not know for what he was being tried, that he was not permitted to have witnesses, and that the whole trial was a farce as far as justice was concerned.[45] The officers denied these accusations and claimed that the military trials were conducted fairly.[46]

The point over which the most discussion was raised was whether the civil courts were open when martial law was declared and the military courts established. Although the question what was meant by the "courts being open and in the proper and unobstructed exercise of their jurisdiction" was considered at length, the Investigation Committee reached a dif-

[45] *Ibid.*, pp. 180-192.

[46] The following is a record of a typical trial conducted by the court (*Hearings*, p. 68):

MIKE WHITTINGTON.

Charge.—Refusing to obey the lawful order of an officer of the West Virginia National Guard, given in pursuance of the proclamation of Governor William E. Glasscock, dated September 2, 1912.

Specification.—In that the said Mike Whittington, having been called upon by Lieut. W. W. Point, Second Infantry, and other men of Company H, Second Infantry, National Guard of West Virginia, to surrender to him all firearms in his possession, failed and refused to obey said order, and then and there kept in his possession the said firearms, in disobedience of said order.

This in the military district of Kanawha County, West Virginia on or about the 3d day of September, 1912.

To which charge and specification the accused pleaded "Not Guilty."

Finding.—Of the specification: "Guilty." Of the charge: "Guilty."

Sentence.—To be confined in the jail of Wetzel County, W. Va., for 60 days.

Action.—The commander in chief, having approved the finding and sentence and the record of the trial, directs that the sentence be duly executed at once.

The commanding officer, camp at Pratt, W. Va., will detail a suitable guard to convey the prisoner, Mike Whittington, to the jail at New Martinsville, W. Va., to serve his sentence. The sheriff of Wetzel County is authorized and directed to receive and keep the said Mike Whittington as a prisoner therein until discharged by law.

WM. E. GLASSCOCK,
Governor of West Virginia, ex officio Commander in Chief.
By the Governor: Stuart F. Reed, Secretary of State.

ferent conclusion from that of the Supreme Court of West Virginia. Certain individuals before the Committee maintained that the courts of Kanawha County had been open and that therefore martial law had been impossible. On the other hand, the state officials maintained that the courts had been open in name only, for it had been impossible to secure convictions or even serve process. When the question came before the Committee it was debated hotly by representatives of the state and representatives of the miners. Senator Borah considered it the pivotal part of the case.

Testimony was given which proved beyond a doubt that the civil courts had been open.[47] Even the state admitted that the civil courts had been open but maintained that the judiciary had been impotent and powerless to control the situation. Colonel Wallace said: "No, the courts were not closed, but they were going on with their duties in a good many ways; but my understanding was that so far as matters that grew out of the killings and beatings and one thing and another that grew out of the strike zone, no indictments were returned and nobody was tried, and that was excused by the local officers on the ground of intense feeling on one side or the other."[48]

A specific instance was given by a witness called before the Committee to prove that the civil courts were not functioning in the proper manner. T. C. Townsend said:

> As to the Bobbitt case, a special investigation was made to get evidence as to the persons who assaulted Bobbitt. Quite a number of names were presented to me, and those persons were summoned before the grand jury. All who appeared before the grand jury in regard to that case testified that they were at East Bank on the day that Bobbitt was assaulted; that they saw Bobbitt, but Bobbitt himself was the only man who could identify any person who assaulted him, and I might say that Bobbitt has been killed, and my judgment is that case can never be tried.[49]

A writer in the *Political Science Quarterly* reached the conclusion that "whatever the justification, the fact remains that martial law with its trial by a military commission accom-

[47] *Ibid.*, p. 26. [48] *Ibid.*, p. 254. [49] *Ibid.*, p. 353.

plished in a few days what the civil authorities had for months failed to accomplish, namely, the restoration of peace and order."[50] The Committee concluded, however, that the courts were open but were given no opportunity to function.

The question was then raised whether qualified martial law, which forbade military commissions and courts-martial, would have served to restore order as effectively and as quickly as the absolute martial law that was used. Witnesses were questioned upon this point, and much testimony was received. The state officials upholding punitive martial law had one fact in their favor, namely, that although the soldiers had been in the strike district before the declaration of martial law acting in the capacity of police, yet there was no semblance of order until martial law was declared and military tribunals established. The following testimony bears directly upon this point:

Attorney General Lilly. You have stated you then believed and yet believe it was necessary to declare martial law. I desire to ask you if martial law has been declared or a limited martial law—that is, soldiers put in the field to cooperate and assist the civil authorities in the execution of the law and for jury trials—whether or not convictions could have been had and whether or not by the assistance of the military in that regard the law could have been enforced by the civil courts?

. . . . . .

Mr. Avis. It is hard for me to answer that question. All I can say is that they did not succeed in doing so, and that the matter got worse. And I still say that in my opinion the civil authorities could not have handled the situation there.

Attorney General Lilly. As I understand, although the courts were in session and sitting here in Charleston, the county seat of Kanawha County, yet so far as the enforcement of the law in the strike district is concerned, their functions were paralyzed and inoperative.

Mr. Avis. I think it was utterly impossible for either miner or operator to have gotten such a trial as the Constitution guarantees him, because of the fact that I hardly know of a man in the county

[50] Lawrence R. Lynch, "The West Virginia Coal Strike," *Political Science Quarterly*, XXIX (Dec., 1914), 649.

that did not have preconceived opinions on that subject and had taken sides.[51]

The regrettable fact about the establishment of the military courts was that the civil courts were not given a fair trial in handling the situation. The civil officials, convinced that the civil courts were unable to control the strike, gave up without a struggle. Consequently, the necessity for the use of the military courts is not self-evident, but remains in doubt. The sanction given the use of the military courts during the strike by the Supreme Court of West Virginia shows to what great length the court went in order to find the actions of the Governor and his subordinates constitutional. In the words of Mr. Lynch:

> The one fact that stands out prominently in this strike is the weakness of the civil authorities in the administration of the law. During the entire period the courts of the county were open for all business except that pertaining to the strike. Had a determined stand been taken by the county officials in the earlier outbreak, much of the later violence might have been averted. The men grew bolder as threats and minor disturbances passed unpunished and apparently unnoticed. The grand juries did not fail to consider evidence presented for their consideration, nor to indict when the evidence was deemed sufficient. Nor was the sheriff ever interfered with in the serving of legal process. But, so far as appears, but little attempt was made to bring strike offenders to justice.[52]

The conclusion of Senator Borah's special report was:

> The fact is, and undisputed, that after the declaration of martial law no attempt was had to empanel the grand jury to test the question of the capacity and willingness of the grand jury to act, no civil trial was attempted, and the laws of the State providing for grand juries and the trial of parties charged with crime were not attempted to be put in operation. We think it is not unfair to state that upon the presumption and assumption that the civil authorities could not and would effectually operate, no attempt was made to test the question.[53]

[51] *Hearings*, I, 336.
[52] Lynch, *op. cit.*, p. 650.
[53] *Senate Reports*, 63d Cong., 2d Sess., No. 321, p. 17.

The final report of the Investigation Committee upon the question whether persons had been arrested, tried, and convicted contrary to the Constitution and laws of the United States, was as follows:

> Under martial law in the Paint Creek section a number of individuals were arrested and punished through military authority; that these military courts inflicted punishment without regard to civil statutes, that the civil courts were open while the military courts were in operation; and that there was no real reason for the use of these courts until the civil courts had been given a fair trial. The last point of the report was that great feeling and interest doubtless prevailed generally throughout the country, but the existence of this feeling and its effect upon grand or petit juries was not tested by the calling of a grand jury, or the submitting of the charges against these persons to a grand jury, and no attempt was made to try them before a petit jury—the officers of the county, after the declaration of martial law, proceeding upon the assumption that the feeling and prejudice was so strong as to prevent the operation of the civil authorities, together with a further belief that the declaration of martial law had the effect of suspending and nullifying all constitutional and statutory rights of the accused.[54]

The last point is especially interesting in the light of the *Milligan* decision. In that case it was held that because the civil courts were open, martial law could not be used. The closing of the civil courts would then give occasion for the use of martial law. But the West Virginia officials held that the declaration of martial law depended upon the governor alone and that after he had once declared martial law the civil courts were closed by virtue of the declaration itself. In one case the fact that the civil courts were open precluded all possibility of martial law, while in the other case it was the declaration of martial law that had closed the civil courts. The reason for this divergence rests on the different conception of the meaning of "open" courts. The Governor of West Virginia maintained that the courts must not only be open but be functioning in the proper manner. If not, then the declaration of martial law

[54] *Ibid.*, pp. 3-5.

closed these broken-down courts and transferred their jurisdiction, if the governor desired, to military tribunals. These civil courts may still be open for business concerning questions in no way related to the use of martial law, but they are in all cases subordinate to the will of the military in the proclaimed zone.

It is only fair to state that the Governor and the majority of his subordinates were not criticized personally for their actions. Everyone conceded that the Governor acted in good faith and for the sole purpose of putting down the insurrection and of restoring peace. In an address delivered before the West Virginia Bar Association, W. G. Mathews said: "In what I have said, or may say, as to the course pursued by Gov. Glasscock in proclaiming martial law I hope that I may make it plain beyond question that his sincerely high motives, the purity of his purpose, and his patriotic objects are in no way questioned, but are recognized in the fullest degree and measure."[55]

It has been shown that there were four different theories concerning the use of martial law developed by the Paint Creek strike: the theory of the Governor of the state and his subordinates, the theory of the Supreme Court of West Virginia, the theory of Justice Robinson, and the theory of the Senate Investigation Committee. These different concepts may coincide upon some points, yet they differ in other essential particulars and therefore cannot be united to form one general conclusion concerning martial law.

In the first place, the Governor and his officials considered that the constitution and laws of the state were suspended by the Governor's proclamation of martial law. They thought that each state had the inherent right to protect itself from its foes, both within and without—a necessary requisite of a sovereign state. Governor Glasscock himself thought that a governor had the power to declare martial law and to carry it into effect whenever he thought necessary. He also considered martial law as nothing more or less than the will of the com-

[55] W. G. Mathews, "Martial Law in West Virginia," *Senate Documents*, 63d Cong., 1st Sess., No. 230, p. 20.

mander-in-chief and that therefore he could do anything, regardless of the statutes and the constitution.

The majority opinions of the Supreme Court of West Virginia, while upholding the Governor in his actions, brought forward this theory of martial law. The court held that the governor had the power by the constitution to institute martial law and that his actions, taken in pursuance of the proclamation, were not reviewable by the courts. While the governor acted in good faith, he should not fear any interference by the courts, and the burden of proof rested with the person who tried to prove that the governor did not act in good faith. The only way that a governor could suffer for his activities was by impeachment.

The majority maintained that the fact that the courts were open was not enough to preclude the use of martial law. The courts had to function properly, and the Court was bound presumptively by the opinion of the governor that the courts were not in the proper exercise of their jurisdiction. In conclusion, the Court held that martial law was not contrary to the state constitution but was in harmony with it; and also, that it was not contrary to the due process of law clause of the Federal Constitution, in that it rested on the same principles that permitted a court to punish for contempt, and was, in itself, due process of law. This theory was developed for the purpose of reconciling punitive martial law with the federal and state constitutions.

Justice Robinson, in his dissenting opinions, maintained that the governor, on account of the constitutional provisions, could institute only qualified martial law. He then admitted that martial law of a punitive nature was possible during an actual necessity—only when a real war existed—and could not occur during an insurrection, rebellion, or disturbance similar to the Paint Creek war. His opinion was the forerunner of the doctrine later expressed by the Montana court in *Ex parte McDonald*.[56]

[56] 49 Mont. 454 (1914).

The Senate Investigation Committee admitted that the governor had power to proclaim and institute qualified martial law, but that he could not institute punitive martial law except where the civil courts were closed. In other words, the Committee adopted the strict view of the *Milligan* decision and applied it to West Virginia with the result that its use in West Virginia was condemned.

From these different conclusions we can see that although absolute martial law was enforced by the Governors and upheld by the Supreme Court of West Virginia, there were still differences of opinion, even in West Virginia, concerning its use.

Chapter VII

A RETURN TO QUALIFIED MARTIAL LAW

MARTIAL LAW IN COLORADO IN 1913-1914

IN 1914, WHEN the United States was threatened with a war with Mexico, when troops had been sent into a foreign country, and when actual fighting had occurred, a civil war in the State of Colorado was costing more lives and money besides threatening the very government of that state. Fighting was brought about by the coal strike of 1914. All the newspapers at that time were full of the Mexican situation, while the Colorado disturbance was relegated to the back pages. Yet the *New York Evening Post* made the sarcastic statement that "Victoriano Huerta might well prefer to sever relations with a Government under which it is possible for women and children to be mowed down by machine guns in a frenzy of civil war."[1]

Martial law is not a cure. It does not remedy the fundamental causes of a revolt or insurrection. It is merely a means of stopping such insurrection and of protecting property and the lives of citizens. True, martial law can make rebellion distasteful and even useless, but to render martial law unnecessary all causes for revolt must be removed. The failure of the mine owners and employees to settle their dispute permanently in 1904 led to the greater dispute of 1914. The editor of *Everybody's Magazine* said: "The war in Colorado will not be ended by the presence of Federal troops, nor by the punishment of a strike leader, a lieutenant, or a governor as scapegoat. Not until the causes are studied—and eliminated—will trouble be over."[2]

The Colorado "war" was similar in many respects to the preceding "war" in West Virginia; it was a dispute between

[1] See opinions of different newspaper editors in "The Colorado Slaughter," *The Literary Digest*, XLVIII (May 2, 1914), 1033.

[2] Editor's note to George Creel, "The High Cost of Hate," *Everybody's Magazine*, XXX (June, 1914), 755.

the operators and the miners, principally over the union. The Baldwin-Felts Detective Agency furnished men as guards to the mine owners. Many men, and even the same machine guns that were used in West Virginia, were transported to Colorado.[3] Except for the use of the federal troops in Colorado and the more radical type of martial law employed in West Virginia, the disturbances were nearly alike. This similarity of detail, therefore, makes a minute account of the Colorado struggle unnecessary.

The struggle was looked upon by the participants as civil war; some of the strikers even claimed belligerent rights. At one time during the strike an automobile full of mine guards was ambushed, resulting in the death of four men and the serious wounding of a fifth. Governor Ammons of Colorado received a visit from one of the important labor leaders who, according to the Governor, claimed "that the men who ambushed and murdered these people ought not to be prosecuted, for the reason that a state of war existed, and that the right of the strikers to kill the mine guards should not be questioned."[4]

One of the grave dangers that accompanies the use of the militia in labor disputes is that the militia, consciously or unconsciously, will ally itself with one or the other of the groups engaged in the controversy. One of the principal grievances of the labor group in Colorado was that men in the militia, it was claimed, were not only acting as soldiers, but were also receiving money from the coal companies as guards. It was testified before the Congressional investigation committee that some members of the militia, while receiving one dollar per day for their services, at the same time received three dollars per day from the operators as guards.[5] Undoubtedly this circumstance did not aid in settling the dispute. The Committee of Investigation said:

It seemed the militia was on the side of the operators in this controversy, and the evidence seems conclusively to prove such to have

[3] *House Documents*, 63d Cong., 3d Sess., No. 1630, p. 6.

[4] Elias M. Ammons, "The Colorado Strike," *North American Review*, CC (July, 1914), 37.

[5] *House Documents*, 63d Cong., 3d Sess., No. 1630, p. 6.

been the case. . . . The sooner men armed in the service of the State learn that the men with whom they have to deal may be poor and ignorant, and even violators of the law, but are still human, the better it will be for all concerned under such circumstances.[6]

The state militia was called out to preserve order, and during the reign of the militia, many people were kept in detention by the military authorities. In January, 1914, four habeas corpus cases were brought before the District Court in Las Animas County, but the right of the military to hold people in detention was upheld. Mother Jones, who was also held by the militia, applied to the Supreme Court of Colorado for a writ, but the court denied her application.

A military commission was established by the commanding general. This court differed very much from those set up in West Virginia.

The purpose in view in establishing the Military Commission was to prevent the imposition of unnecessary hardship and imprisonment in cases where no reasonable grounds existed for detention, and to insure, by the collective judgment of such a board, wise and discriminating imprisonment of those who should be detained in military custody. . . . The military commission was in no sense a court. It did not undertake to try anyone for criminal offenses or anything else. It was a kindly and humane device established for the sole purpose of minimizing the possibility of error in judgment attaching to the incarceration of civilians.[7]

In other words, according to the commanding general, the commission was used only to secure innocent civilians from a long stay in the detention camps—a great modification of the purpose for which martial law was established in West Virginia.

The militia remained in control of the situation until it was confronted with the duty of protecting the strike breakers who

[6] *Ibid.*, pp. 16-17. For a full account of the events that occurred during this strike, see *Conditions in Coal Mines of Colorado, Hearings before Subcommittee Pursuant to House Resolution*, 387, 2 V. (1914).

[7] *Report of the Commanding General of Troops to Governor of Colorado, Cong. Record*, 63d Cong., 2d Sess., Vol. LI, Pt. X, p. 10292.

had been imported into Colorado to work in the mines. At this point the state power broke down utterly. The Industrial Committee Report described the Ludlow Battle:

> During the ten days fighting at least fifty persons had lost their lives, including the twenty killed at Ludlow. From 700 to 1,000 armed strikers had been in absolute control of large areas of territory and had waged open warfare against mine guards, militia and mine employees. . . . Each side reported its casualties after each skirmish and made claims as to the number of men killed and wounded on the opposing side. Newspapers friendly to one side or the other charged with apparent satisfaction that the losses of the other side had been greater than were admitted.[8]

The Governor himself said:

> The time came when the rebellion assumed such proportions that it could not be met with the greatly reduced force at my disposal, a force unpaid for four months, and to pay whom for any further service there was no visible means or prospect of means. I called the Legislature of the State together in extra session to provide for the expense. At the same time I requested the President of th United States to take charge of the situation with Federal troops. That request was honored. Upon the coming of the Federal troops, the National Guard was withdrawn from county after county. The name and power of the United States was freely invoked; the strikers and their sympathizers subsided, and peace and order was restored.[9]

The enormous cost of such a struggle is evident. Colorado did not have enough money to pay even her militia and was later forced to issue bonds for this purpose. The federal government helped Colorado for a short time, but as the expenses mounted and as Colorado made no attempts to resume control of the situation, the federal authorities became impatient with the state.

The President, after the introduction of the federal troops, issued proclamations concerning firearms and introduced other regulatory measures.[10] He was the military commander in

[8] *Report of Industrial Commission*, pp. 135, 136. [9] Ammons, *loc. cit.*, p. 43.
[10] *U. S. Statutes-at-Large*, Vol. 38, Pt. 2, p. 1994.

command and supplanted whatever authority the Governor of Colorado had previously exerted over the situation. In a letter Secretary of War Garrison stated:

> It seemed to me that the first thing to do was to restore order; to endeavor to allay this absolutely abnormal tide of passion; and to produce conditions that tended toward normality. Many things which are perfectly lawful under normal conditions must, under such circumstances, be temporarily suspended. For instance, I have ordered all the saloons closed; I have forbidden the importation of any arms and ammunition into the State; I am taking away from those who possess them arms and ammunition; I am closing up shops which sell arms and ammunition.[11]

In other words, the President, through the Secretary of War, did whatever he deemed necessary in order to control the situation.

With respect to the persons held in detention by the federal troops, the Secretary of War issued the following instructions:

> Persons in military custody will be held under authority of the United States and a writ of habeas corpus issued from a State court should be met with a return declining to produce in court the body of the prisoner on the ground that he is held under the authority of the United States. In case of a writ issued from a United States court you will obey the writ, produce the body of the prisoner, and state in full the reasons for restraint, reporting the fact direct by telegraph to The Adjutant General of the Army.[12]

Evidently the Secretary of War desired only qualified martial law, but at the same time he did not permit any interference from the state courts.

No declaration of martial law was issued by the federal government. One of the commanders of the troops in Colorado suggested that martial law be declared. Secretary Garrison replied: "I do not know of anything that you can not do under existing circumstances that you could do any better if there was a written proclamation of martial law posted in your district."[13]

[11] *Senate Documents*, 67th Cong., 2d Sess., No. 263, p. 315.
[12] *Ibid.*, p. 313.
[13] *Ibid.*, p. 315.

The mine owners were not pleased with the presence of the federal troops, and questioned the authority of the Secretary of War for the measures taken. Their anger was caused especially by the restriction placed upon the importation of strike-breakers. Secretary Garrison, in a letter, replied:

> The authority is that which is technically referred to as the police power, or power exercised where martial law prevails. I do not suppose it is necessary to point out that I am the constitutional organ of the President in issuing orders, and that the ultimate source of power is the President. Under the Constitution, where domestic insurrection overthrows the power of the State, the President is required to interfere if properly requested. When he interferes and sends the national forces into a State, he has full power and authority to do whatever he finds necessary to restore public order and maintain it.[14]

The sequence of events that usually takes place when a governor asks the President for help in enforcing martial law is as follows: the insurrection is raised; the governor declares martial law; he is unable to control the situation and calls on the President for assistance; when the President honors the request of the governor he takes over the command of the situation and can either place the federal troops directly under the command of the state authorities, as was done in Idaho, or else he can take direct charge of the situation from Washington and direct the forces as he, alone, sees fit. The President does not have to issue a proclamation of martial law. The fact that the governor of the state has asked for assistance gives the President the constitutional right to bring troops into the state and to take any action he thinks necessary. Of course the President can proclaim martial law if he so desires. But in this case Mr. Garrison thought it unnecessary, although the course actually pursued amounted to little less than martial law, and indeed was defended by the Secretary of War on that ground.

Three main conclusions may be drawn from the events that occurred during the strike: the growing extent and the serious nature of industrial disputes; the danger of the soldiers whose

[14] *Ibid.*

purpose is to quell the disturbance, becoming involved in the strike and thus counteracting the purpose for which martial law is declared; finally, the position of the President and the powers that he may exercise in helping a state put down an insurrection by the use of troops and martial law, are clarified to some extent.

MARTIAL LAW IN MONTANA IN 1914

All of the industrial disturbances that have been studied thus far were brought about through miners' organizations. In Butte, Montana, in 1914, martial law was again called into use, and again miners and mine owners were directly concerned. It is unnecessary to go into the facts, but suffice it to say that there had been trouble in the miners' union in Butte for three months. The local union was split into two contending factions. The trouble growing in intensity, the *New York Times* for August 31, 1914, stated that "The Butte Mine Workers Union, made up of seceders from the Western Federation of Miners, recently opened a campaign to force every man employed in the mines to join the new organization. Deportation was the fate of those who refused to enlist in the new organization. . . . Men at the street corners have urged the miners to use direct action, not only in the mines but in the business district." On the night of August 31, the Anaconda Copper Company's office was blown up, and the trouble rapidly grew into an insurrection. The Governor immediately issued a proclamation of martial law. His action received popular approval, and even *The Nation* stated, "That anarchistic ideas and a labor-union quarrel should repeatedly endanger orderly and industrial development is a condition justifying not merely martial law, but the sternest repressive measures."[15]

The most important case growing out of the use of martial law[16] in Butte was *Ex parte McDonald*,[17] one of the most inter-

[15] *The Nation*, XCIX (Sept. 10, 1914), 296.

[16] Martial law was proclaimed by the Governor on Sept. 1, 1914. The proclamation, which is a typical one, read as follows:

"WHEREAS, It has become apparent that conditions of lawlessness and defiance of authority prevail in the County of Silver Bow, State of Montana, and that com-

esting cases concerning martial law that had arisen since the *Ex parte Milligan* decision. In brief, this case suggested a gradation of the use of martial law by persons in authority, through invocation of the principle that the governors of the different states cannot put martial law into effect in its entirety, but that this rests solely with the national government. The case is thus a repudiation of the West Virginia decisions. Such actions as were committed by the military commission in West Virginia were considered unconstitutional by the Montana court. A reaction against the unlimited authority of the governor set in, and, indeed, the doctrine in *Ex parte McDonald* certainly seemed more logical, just as effective as, and truly more harmonious with the ideals of democratic and constitutional government than that given by the court in *State* v. *Brown.*

The facts of the case are as follows: McDonald, Gillis, and others who were in the custody of the military authorities filed in the Supreme Court of Montana petitions for writs of habeas corpus. All, with the exception of Gillis, claimed that they "had been arrested without warrant and were being held without bail to be tried, without a jury, before an alleged court or tribunal set up by the military authorities, upon charges to the petitioners unknown, and this notwithstanding they had infringed no law and were not members of the organized

binations to resist the execution of process exist in said Silver Bow County, and that the power of the County, has been exerted and has not been sufficient to enable the officers having process to execute it; and

"WHEREAS, It has been represented to me by properly constituted authorities that the peace officers of the said county are unable to secure service of process and compliance with the law; and

"WHEREAS, It is made sufficiently to appear to me that peace and quiet cannot be re-established in said County of Silver Bow without the aid of some force other than the present constituted authority of said County:

"Now, THEREFORE, I, S. V. Stewart, as Governor of the State of Montana, under and by virtue of the authority vested in my be the Constitution and the statutes of said State, do hereby proclaim the said County of Silver Bow, State of Montana, to be in a state of insurrection, and do hereby declare that said Silver Bow County, State of Montana, be and is hereby under martial law, and under the jurisdiction of the military authorities of said State of Montana; and such military forces as may be ordered into service to enforce the provisions of this proclamation shall be under the command of Major Dan J. Donohue, this proclamation to continue until the same shall be revoked or modified. . . ."

[17] *Ex parte McDonald,* 49 Mont. 454 (1914); *In re* Gillis, 49 Mont. 454 (1914).

militia of the state."[18] The respondents claimed that they had power to keep the men in detention through the proclamation of martial law by the Governor; that such action was necessary in order to put down insurrection; and that they were holding the men in confinement only until the trouble was over, when they would turn them over to the civil authorities.

Gillis, however, had already been tried by a court set up by the military authorities, and had been sentenced to prison for eleven months and to pay a fine of five hundred dollars, notwithstanding the fact that the district court of Silver Bow County was, during the period covered by said proceeding, open and actively attending to business. The defense of the respondents was that the Governor had the power to declare martial law, and that

> . . . when the proclamation, as is the case here, declares absolute martial law, that of itself has the effect of suspending all governmental civil tribunals, and that the supreme authority and responsibility of government is thereby vested in the military forces, . . . and such military forces, in the discharge of the duties resting upon them, may establish courts for the trial of offenders who violate military orders or who violate the laws of the state within the troubled zone.[19]

Justice Sanner, giving the decision of the court, held that the governor, as the chief executive, had the power to issue a proclamation of martial law and to send troops into "the trouble zone." He continued, "nor is there the slightest doubt that, as he must determine so he alone can determine when a state of insurrection exists and when the conditions require the interposition of military aid."[20] The conclusions were in perfect harmony with the *In re Boyle, In re Moyer,* and *Moyer v. Peabody* decisions. The governor also had the right to hold the men in custody, Justice Sanner maintained, for

> After a consideration of all that was said in argument and of practically all the accessible literature on the subject, we are convinced that the theory which accords the least power to the gov-

[18] *Ibid.*, p. 458. [19] *Ibid.*, p. 460. [20] *Ibid.*, p. 460.

ernor and to the militia in cases of insurrection is that he acts as a civil officer of the state, and that the military forces under him operate as a sort of major police for the restoration of public order; and we confidently assert that under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld.[21]

With respect to Gillis, however, the court gave a separate decision. Granted that the military forces could hold men in custody,

Does it follow, then, that the Governor can suspend the writ of *habeas corpus*, declare martial law and authorize the creation of military tribunals to try citizens for violations of the laws of the state? . . . This claim can, of course, have no basis save upon the theory that the governor, having declared martial law, *ipso facto* suspended the writ of *habeas corpus*. Certain decisions were presented which sustain this view; . . . but we do not care to discuss them, for it has been the settled law of this country ever since 1807 that the suspension of the writ of *habeas corpus* is a legislative and not an executive function. . . . If, therefore, the power to suspend that writ must stand or fall with the power to establish absolute martial law, the inference is inevitable that no such *regime* can be established by the executive.[22]

The court asked the question:

Is it possible for the executive by proclamation or otherwise to constitutionally establish in this state any form of martial law which will authorize the conviction of a civilian for crime, without trial by jury?[23]

In answering this question the Justice gave a brief outline of the history of martial law and its mode of exercise. He arrived at the conclusion that the governor did not have this power. Thus Justice Sanner not only denied to the executive the power of suspending the writ of habeas corpus because it was a legislative function, but also failed to admit that the governor had the power to establish military courts to try civilians in time of insurrection of the type that occurred in Silver Bow County. In reaching this conclusion he said:

[21] *Ibid.*, p. 462. [22] *Ibid.*, pp. 466, 467. [23] *Ibid.*, p. 467.

It is insisted, however, that under all the decisions the executive can establish martial law in time of war when the ordinary tribunals are not open; that an insurrection is war, and that the proof at bar shows the civil tribunals of Silver Bow County to have been closed. When in domestic territory the laws of the land have become suspended, not by executive proclamation but by the existence of war, the executive may supply the deficiency by such form of martial law as the situation requires, but we deny that insurrection and war are convertible terms.

The term "war" is used in the books, not in its popular but in its legal sense, and only the national Congress can declare or recognize the existence of war. There is a very great distinction between insurrection and war. It is this: War is an act of sovereignty, real or assumed; insurrection is not. War makes enemies of the inhabitants of the contending states; but insurrection does not put beyond the pale of friendship the innocent in the affected district. War creates the rights and duties of belligerency, which to a mere insurrection are unknown. Doubtless an insurrection may become war, as was the case with the great rebellion, but it does not become so in the legal sense until the rebellious party assumes political form.[24]

The above doctrine would seem to deprive the governor of the power to declare martial law under any condition, but such was not intended. The court concluded its opinion by saying that

Martial law, however, is of all gradations, and although the governor cannot by proclamation or otherwise establish martial law of the character above discussed, he is not barred from declaring it in any form. We must therefore assume that in using that phrase in his proclamation, he meant only such degree or form of martial law as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection and to direct their movements without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities; but neither he nor the military under

[24] *Ibid.*, p. 474.

him can lawfully punish for insurrection or for other violations of the law. The courts cannot be ousted by the agencies detailed to aid them; nor can their functions be transferred to tribunals unknown to the Constitution.[25]

The conclusions reached in this case are impossible to reconcile with those reached by the court in West Virginia. Is the *McDonald* case good law? In the first place, by that decision the governor could never declare absolute martial law because he could never suspend the writ of habeas corpus. Suspension of the writ was considered a legislative act by the court and not even the President of the United States could suspend the writ unless authorized by Congress. Even the court admitted that this was debatable law, for the opinion stated that "We prefer, however, to rest our conclusion upon other grounds."[26] The reason given in the opinion why the executive could not establish absolute martial law was that absolute martial law could only be used in "time of war," and by "time of war" was not meant "time of insurrection." The court thus made a clean distinction between war and insurrection. The trouble in Silver Bow County, at Paint Creek, in Colorado, and in Idaho was only insurrection and not war, any decisions of the different courts to the contrary notwithstanding. Congress alone could declare war, and only then might absolute martial law be used. However, in *Luther* v. *Borden* the Court held that insurrection was war, at least in that particular case. A person may still wonder whether the distinction between insurrection and war, however logical, is yet admitted by law.

After thus limiting the governor's power, the Court admitted that he could establish qualified martial law. He could not usurp judicial power, he could only re-establish it.

It would doubtless seem advisable to limit the power of the governor to declaring qualified martial law during industrial disputes. Without doubt all the insurrections studied could have been settled with qualified martial law alone. The *McDonald* decision rests upon precedent, but it must be re-

[25] *Ibid.*, pp. 476-477. [26] *Ibid.*, p. 467.

membered that there is precedent upon the other side of the question. The decision includes, from necessity, the President of the United States as well as the governors of the different states. This point has already been discussed and it was found that, if the President could declare martial law only after a declaration of war by Congress, its use in many cases would be rendered impossible, although absolutely necessary. The previous limitations that have been placed upon the President's use of martial law restricted it to the scene of actual fighting, regardless of whether Congress had declared war.

The *Ex parte McDonald* decision, when applied to the states, should prove workable. But, as stated in the opinion, it does not apply to the President and the Federal Government. Two years after the above decision, the same court again stated its position with respect to the use of martial law. During the period of the disturbance, the military authority ordered that all saloons be kept closed at certain hours and that the stock of liquors of all violators of this order would be destroyed. Herlihy violated this order, and his stock was destroyed. Action was brought to recover damages.[27] The court thought that the closing order was reasonable but that no property should have been destroyed without the individual being charged with the offense and given an opportunity to defend himself. The opinion admitted that in time of trouble the demolition of a building is permitted to prevent the spread of a conflagration, but "only the most overriding necessity will justify or excuse the officer ordering such destruction."[28] The court did not see any state of war or any necessity for keeping the goods from falling into the hands of the enemy, and therefore awarded damages to the saloon-keeper. In the decision there was no noticeable change in the court's view of martial law from that expressed in the *McDonald* case.

MARTIAL LAW IN WEST VIRGINIA IN 1921

The Mingo County war in West Virginia in 1920-1921 was the result of another coal strike. Various reasons were given

[27] *Herlihy* v. *Donohue*, 52 Mont. 601 (1916). [28] *Ibid.*, p. 610.

for the strike and the violence that accompanied it. A member of the famous Hatfield clan claimed that "young blood and corn likker" were the cause of the struggle. A writer for the *New York Evening Post* maintained that the war was over the question, "Shall the miners have the right to belong to the United Mine Workers of America and to bargain collectively with their employers?" As the strike continued without abatement and with more violence, the *Duluth Herald* said that the issue of law and order had become the greatest question and overshadowed the original causes of the dispute.[29]

The seat of this conflict was the lower part of the state of West Virginia, bordering on Kentucky. This section of the country, called the Williamson coal field, was one of the last of the West Virginia fields to be developed. The union did not have the miners of the section organized, and the trouble was brought about by the attempt of the union to organize them. The majority of the miners of the Williamson field included, at that time, native mountaineers who considered personal liberty of the highest importance and resented any interference by federal or state troops. At the same time these people were accustomed to violence. The famous Hatfield and McCoy feud had taken place in this part of West Virginia. Because of the very nature of the people, there was little doubt that, if a strike were declared, the authorities would have their hands full preserving order.

The reasons given by the miners for the strike are as follows: They claimed that the right of freedom of speech and assembly had been violated by the operators; that the operators were trying to crush the United Mine Workers of America, a lawful organization; and that men should be allowed to join a labor organization if they so desired. The operators, on the other hand, contended that they had the constitutional right to hire men individually and to refuse to deal with the United Mine Workers; that all the trouble in the district was caused by the unions and that the proposed

[29] For the different reasons that might have brought about the strike, see "The Blame for West Virginia's War," *The Literary Digest,* LXX (Sept. 10, 1921), 16.

strike was part of a conspiracy of labor with the operators in other coal-producing states. Since no agreement could be reached between the two groups, the strike was finally called.[30]

Senator Kenyon, in the report of the Investigation Committee to the Senate, said that the miners were determined to organize, while the operators were just as determined not to recognize the union. Such conflicting purposes, he thought, would inevitably end in trouble.[31]

It is unnecessary to go into the various details of this strike, which in many ways was similar to the Paint Creek disturbance, but it is necessary to state that the Governors of West Virginia[32] were at a disadvantage. On account of the World War, the governor of the state did not have the militia at his beck and call and was therefore forced to call for federal troops for aid. Federal troops were sent into the strike district three separate times. On August 29, 1920, they were first sent in but were withdrawn on November 4. They were sent in on November 28, and again in the spring and summer of 1921. Various proclamations of martial law were issued by the Governors of West Virginia, but the state officials did not want to institute absolute martial law. It was hoped that the strike could be settled without resorting to this extreme measure. Governor Cornwall and his successor in office, Governor Mor-

[30] See *Hearings Pursuant to Senate Resolutions*, No. 80, 67th Cong., 2d Sess., 3 v.

[31] A fuller statement of the view of Senator Kenyon is as follows: "The issue is plain and perfectly apparent. The operators in this particular section of West Virginia under consideration openly announce, and did before the committee, that they will not employ men belonging to the unions, for, as they say, they believe they will become agitators; and further, that they have the right, and will exercise it if they desire, to discharge a man if he belongs to the union, and in making these claims they believe themselves to be within their constitutional rights.

"On the other hand, the United Mine Workers are determined to unionize these fields which are practically the only large and important coal fields in the United States not unionized.

"Here we have the situation of two determined bodies trying to enforce what they believe are rights, which rights are diametrically opposed to one another, and we have the situation of an irresistible force meeting an immovable body. In such case there can be nothing but trouble" (*Senate Report*, 67th Cong., 2d Sess., No. 457, p. 4).

[32] There were two governors of West Virginia during the time of this strike, Governor Cornwall and Governor Morgan.

gan, thought that the mere presence of the soldiers would be sufficient to control the situation and prevent lawlessness.

Having these considerations in mind, the Governor, on November 27, 1920, declared that Mingo County was in a state of insurrection and that the federal troops would have full power and authority in the disturbed zone. These federal soldiers were able to preserve order without much trouble during their first occupation. The civil courts were left open, and all offenses were turned over to the civil authorities. Governor Morgan, declaring martial law on May 19, 1921, issued the proclamation in the same form as did Governor Cornwall, except that he added specifically: "I do hereby further declare and proclaim that said territory is, and shall remain, under martial law until the necessity therefor ceases to exist and my further order: Provided, however, that the civil courts of Mingo County shall continue to have jurisdiction of, and try, all crimes, misdemeanors and offenses against the civil law."[33]

The instructions given General Bladholtz, who was in command of the federal troops sent into the strike district,[34] were:

In achieving your object necessity is the measure of your authority. You will always countenance and support the civil officers in executing their laws, and if necessary you will protect and support and aid them in the execution of their duties. The civil functions and processes of the State will not be interfered with, nor superseded, if exercised effectually in the suppression of violence and the restoration of order. Persons arrested should either be admonished and sent home, or if detained they should be delivered to the State authorities as soon as practicable. Where that course results in the release and return to scenes of disorder of persons whose presence there impedes the accomplishment of your purpose, such persons may be retained in military custody so long as the necessity exists.[35]

[33] From *Proclamation of Governor Morgan,* May 19, 1921.

[34] These instructions were issued to General Bladholtz when the federal troops were sent into West Virginia to stop the "armed march."

[35] *Senate Documents,* 67th Cong., 2d Sess., No. 263, pp. 320-321.

Evidently the purpose of both the state and federal authorities was not to have the absolute type of martial law that was used at Paint Creek.

The Governor by proclamation had instituted qualified martial law; that is, persons could be kept in detention while the disturbance continued. Before the federal troops appeared, the Governor did not have any militiamen to act as police, and so he delegated to the civil officers the authority to enforce the rules of qualified martial law; that is, they were to act in a double capacity, enforce the civil laws as county officials, and at the same time to act as subordinates to the governor in the enforcement of martial law. Unfortunately, this method of procedure was not upheld by the courts. This was the first case in which the Supreme Court of West Virginia failed to uphold the actions of the Governor with relation to martial law.

The case in question was *Ex parte Lavinder.*[86] Under his power as an official instituting martial law, the sheriff of Mingo County had arrested several persons. The offense for which they were held was not one under civil law. The men demanded writs of habeas corpus, and in this way a chance was given to the court to restate or to alter its previous opinions with regard to martial law.

It is almost impossible to reconcile the decision in this case with that of *Hatfield* v. *Graham.* The *Lavinder* decision restricted the power of the governor. It is very unusual to find such contradictory decisions given by the same court in so short a time, and they show the power of public opinion.

The facts of this case are as follows: Lavinder and others were placed in jail by the sheriff of Mingo County for acts that were permitted by civil law yet were prohibited by the Governor's rules and regulations over the so-called military district. The sheriff did not claim that he was acting in his usual capacity as a civil officer, but that he was delegated by the Governor to enforce martial law and that he was acting in this capacity when he arrested these men. The prisoners ap-

[86] *Ex parte Lavinder,* 88 W. Va. 713 (1921).

plied to the civil courts for writs of habeas corpus and in this manner the question of martial law came before the court.

The most important point of the decision was that the so-called martial law, instituted by the Governor and the sheriff of Mingo County, was not martial law at all; therefore, the rules and regulations of martial law could not be enforced. Although the court upheld the declaration and use of martial law that had occurred during the Paint Creek disturbance, it maintained in the *Lavinder* case that martial law had never been instituted and that the decisions of the court handed down after the use of martial law at Paint Creek, did not apply. It was said in the former decisions that if the governor acted in good faith in his declaration and use of martial law, his actions were not reviewable by the courts. In this case the Governor acted in good faith, yet the courts passed upon his actions. Justice Poffenbager said:

> Admittedly, there was no actual military organization or force representing the state government, in Mingo County, at the time of the arrests. The Acting Adjutant General, holding a military commission, was on the ground and was directing the civil authorities of the county, the sheriff, constables, justices, policemen and the *posse comitatus,* but they were not enrolled, enlisted nor organized as a military force. Under the law, the Governor had a potential military force in the state and county, the unorganized militia; but, being unenrolled, uncalled and unorganized, it could not have been deemed to be an actual military force, nor treated as such. Although officially declared to be in a state of war, the county was not occupied by any military force of the state. The enterprise was an attempt to put into effect and enforce military or martial law, by merely civil agencies. The presence of a military officer and action of the civil authorities, under his direction, constituted no more than mere military color in the situation and procedure.[37]

The broad conclusion of the opinion was that

> The existence of war between a state and citizens of a portion of its territory, arising out of an insurrection, does not of itself inaugurate martial law in such territory, nor does the proclamation there-

[37] *Ibid.*, pp. 715-716.

of by the Governor put it in operation. Nor does the fact, nor the proclamation, nor both afford any constitutional basis for a proclamation of martial law in such territory, unless nor until a military force is put into the field for administration and enforcement thereof.[38]

The court stated that the substitution of martial law for civil law could not extend beyond the actual theater of the war, in direct contradiction to the decision of *Hatfield* v. *Graham,* where the court upheld the Governor in closing a newspaper office located without the prescribed zone of warfare. It is impossible at this point to reconcile these two decisions given by the same court within a period of ten years. The court further limited the extent of martial law by saying:

> Martial law within the territory of a country at war with another, or with rebellious citizens or subjects in possession of a part of its own territory, is not a necessary incident or consequence of the existing state of war. . . . Besides, until the declaration of war is carried into effect by actual military or naval operations, there is no such an emergency as justifies the possession or exercise of such extraordinary powers as the statute confers in time of war.[39]

The conclusion reached by the court was that this was not a time of actual war. These men were arrested under rules which occur only when actual war exists, "and, under them, citizens cannot be arrested or detained, except in the time of such war, for acts not constituting offenses under the civil law, though proscribed and forbidden by executive regulations, rules and orders set forth in proclamations of war and martial law."[40]

The *Harvard Law Review,* in its comment upon this case, did not agree with this opinion, and submitted the point that

> . . . even though troops are unavailable, preventive martial law may be thus established. The necessity for martial law exists only when civil authority is inadequate to avoid a reign of lawlessness. Unless this power is granted,—the necessity being admitted,—lawlessness ensues. To meet such an emergency, the governor may, as

[38] *Ibid.,* p. 713. [39] *Ibid.,* pp. 716, 720. [40] *Ibid.,* p. 714.

an exercise of his military power, use civil officers, who as citizens are potential militiamen, and whose acts are justified not by their civil authority, but by the military authority of the governor.[41]

This opinion is probably a more sensible one than that taken by the court.

Following this decision the Governor at once began to enlist men in the state militia, for appeals for martial law continued to come from Mingo County. The Governor therefore issued another proclamation on June 27, 1921, in which he complied with the rules laid down by the court in the *Lavinder* case by saying in it: "I do hereby declare and proclaim that it is necessary to call out, and do hereby call out, for active duty in said County of Mingo, one hundred and thirty men of the enrolled militia of said County of Mingo, when such enrollment is completed, to execute and enforce the laws of West Virginia."[42] These men immediately went on duty and remained in control of the situation until the Kanawha invasion and the arrival of the federal troops. During this period, so far as can be ascertained, punitive martial law was not used. All civil offenses were tried in the civil courts. If the offense was contrary to the rules of the Governor during the period of the martial rule, the persons were detained in custody and no writs of habeas corpus were recognized by the officers.[43]

[41] "Constitutional Law—Powers of the Executive—Martial Law—Absence of Military Law," *Harvard Law Review,* XXXV (Jan., 1922), 338-339.

[42] *Proclamation of June 27, 1921.*

[43] The system that was used, according to a writer in *The Nation,* was: "Arrests are made without warrants, but under the Governor's proclamation the civil courts remained in Mingo County to try persons charged with offenses against the laws. Such persons may obtain bail. Offenses against the proclamation of martial law are non-bailable and beyond the pale of the courts. In this realm Major Thomas B. Daws, acting Adjutant General of the State and Commander of the militia in Mingo County, rules absolute and supreme. He is not only judge and jury; he is law-maker besides. He decides what *are* offenses against the Governor's proclamation and how they shall be punished. He claps people into jail and lets them out as he pleases. Charges are regarded as superfluous and even the delay and bother of trials by courts martial have been dispensed with. Whatever else may be said against the system, it cannot be condemned as enmeshed with red tape" (Arthur Warner, "Fighting Unionism with Martial Law," *The Nation,* CXIII, Oct. 12, 1921, 396).

In Louisiana in 1915 the Supreme Court of that state held that, although martial law was declared and troops were in the district, the district court should still try

During this strike use was also made of federal troops. The positions of the President of the United States, of the governor of the state, and of the troops themselves were discussed and cleared up to some extent. At the time of the three days' battle in May, 1921,[44] the Governor, fearing that he would not be able to control the situation with the forces that he had at his disposal, asked the President to send troops and to declare martial law. President Harding consulted with Secretary Weeks, and a declaration of martial law was drawn up and signed, while a number of federal troops were held in readiness to be sent into the strike zone. Senator Sutherland of West Virginia called on the President and asked for martial law. Pressure was brought to bear on all sides to force the President to take this drastic measure. Several requests for troops were made by the Governors of both Kentucky and West Virginia. (The strike occurred on the Tug River, the boundary line between the two states.) Representatives were sent to West Virginia by President Harding, and, acting upon their recommendation, the President neither sent troops nor proclaimed martial law. He thought that the state governments ought to handle the situation, if possible, without federal aid. The following telegram, making known the President's position, was sent by George B. Christian, Jr., the President's secretary, to Governor Morgan:

The President directs me to address to you the statement that the Federal Government is ever ready to perform its full duty in the maintenance of constitutional authority, but he feels he is not justified in directing the military forces of the nation to enter the State of West Virginia, according to your request, until he is well assured that the State has exhausted all its resources in the performance of the duty clearly belonging to it, or the situation has

cases and continue in operation. Governor Hall had declared martial law but he also requested the judge to hold court and to discharge the duties of his office. This was sufficient reason, the court thought, for the court to continue to function. *In re State ex rel. Barataria Land Co.*, 138 La. 428 (1915). See also *County of Christian* v. *Merrigan*, 191 Ill. 484 (1901); Charles Fairman, *The Law of Martial Rule*, p. 203.

[44] For a more explicit account of what took place, both in West Virginia and Washington, see the *New York Times*, from May 13 to May 30, 1921.

become a menace to the Federal Government or a hindrance to the performance of its functions. On the representation thus far made the President is not convinced that West Virginia has exhausted all its own resources, and he awaits more definite assurances.[45]

The President did not think it advisable to use federal troops as police, especially when the state had not done its utmost to control the situation. Preserving order was primarily a duty for the states. The *New York Times* editorially approved the action of the President:

A loose tendency has been growing to appeal too quickly to Washington to do police work properly belonging to the States. It seems easier to invite Federal power and soldiers of the regular army often appear to overcome rioters more quickly than can militiamen. But the fact remains that it is a confessed failure of State government not to be able to maintain law and order. It ought to be felt as a reproach and disgrace by its citizens. Only in the last resort should the President be asked to do what the Governor has sworn to do himself.[46]

Later, when the Kanawha miners invaded the Mingo fields, the Governor of West Virginia again called on the President for aid, and this time troops were sent. The President again prepared a proclamation of martial law, but he hesitated to declare martial law as a federal measure since the troops could take any necessary action without such proclamation.[47] Thus he took the same position as that of Secretary Garrison in the Colorado strike. The civilian troops were able to protect the county from the invaders until the federal troops arrived. From this time on the army of invading miners gradually melted away, and serious trouble was averted. The federal troops were withdrawn within a short time, and the state again assumed control. Later the strike was settled, martial law was revoked, and civil order was restored.

[45] *New York Times*, May 18, 1921. [46] *Ibid.*, May 19, 1921.

[47] See *New York Times*, Sept. 1, 1921. President Harding on Aug. 30, 1921, did issue a proclamation ordering those engaged in insurrectionary proceedings to disperse, but he did not declare martial law (*U. S. Statutes-at-Large*, Vol. 42, Pt. 2, pp. 2247-2248).

The following conclusions may be reached from the three foregoing instances of the use of martial law: In the first place, there was a strong desire to limit the power of a governor of a state with respect to martial law. In order to do so, the Montana Court made a sharp distinction between insurrection and war. Having made the distinction, the court maintained that punitive martial law could be used only in time of war. Since Congress is the only power that can declare war, the court concluded that the power of the governor to declare was merely a usurped power which could not be legally exercised. It was, however, admitted in all three instances that the governor did have the power to institute qualified martial law, which action the court thought would be equally effective without certain undesirable results. In the second place, whenever a governor of a state asked for federal troops to aid in quelling an insurrection, the President, if troops were sent, was automatically put in charge of the situation, and he did not have to issue a declaration of martial law. The very fact that the governor had asked for troops was sufficient for the President to take any action that he might think necessary. Lastly, it is possible to see that the use of martial law in its absolute form was not considered advisable in labor disputes, for in all these cases there was a reaction from the West Virginia instance, and checks were placed by the courts on the unlimited use of martial law by the state governments.

Chapter VIII

THE INFLUENCE OF THE WORLD WAR UPON THE USE OF MARTIAL LAW

THE "EMERGENCY" DECISIONS AND THE CHAMBERLAIN BILL

ALTHOUGH IT affected nearly every phase of life, the World War did not render recourse to martial law necessary. While the United States Government was not forced to use martial law during the war, it was called upon to use other measures which, while not so drastic in nature, rested upon the same constitutional interpretation that permits the use of martial law. For the duration of an emergency these measures were justified by the doctrine of implied powers and were upheld by the Supreme Court as constitutional. The gist of the opinions of the Supreme Court in these "emergency decisions"[1] was that the national government must protect itself and preserve its existence. In order to do so, the government had certain inherent powers, which are recognized in all governments, to preserve the Constitution and laws and the sovereignty of the state. The Court acted upon its previous statement that when one department of government was exercising this power "it behooves the court to be careful that it does not undertake to pass upon political questions, the final decision of which has been committed by the Constitution to the other departments of government."[2] In order to help win the war, drastic regulations of the railroads, of the whiskey business, and of landlords were permitted. In so far as the Supreme Court is concerned, certainly the implication was that if either the President or Congress deems it necessary to declare martial law

[1] *Wilson* v. *New*, 243 U. S. 332 (1917); *Hamilton* v. *Kentucky Distilleries and Warehouse Co.*, 251 U. S. 146 (1919); *Ruppert* v. *Caffey*, 251 U. S. 264 (1920); *Block* v. *Hirsh*, 256 U. S. 135 (1921); *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170 (1921).

[2] *Fong Yue Ting* v. *U. S.*, 149 U. S. 698 (1893), 712.

within the United States, such action will be upheld by the Supreme Court.

The only real attempt to establish martial law during the progress of the war occurred when the Chamberlain bill was introduced in the Senate. It was primarily a bill to punish spies,[3] but in order to do this, martial law was proposed. If the bill had been passed, martial law would have been extended over the entire United States. The bill simply bristled with constitutional questions.[4] It stated that on account of changed conditions of modern warfare the United States proper had become a war zone and that the establishment of martial law was essential to the winning of the war. It was defended by its author, but serious opposition to its enactment soon developed. Senator Brandegee thought that, with the courts open and with no insurrection, the measure was "absolutely violative of every guarantee contained in the Constitution as to trial by jury and individual liberty."[5]

The bill was referred to the Committee on Military Affairs, and some hearings took place. According to Senator Brandegee, the majority of the Committee was in favor of the measure, and gave little consideration to its constitutionality.[6] He, therefore, by resolution, urged the transfer of the bill to the Committee on the Judiciary.[7]

Nothing ever came of the bill, for just at this point a letter from President Wilson to Senator Overman was made public in which the President stated that he was unalterably opposed to the bill:

My Dear Senator:

Thank you for your letter of yesterday. I am heartily obliged to you for consulting me about the Court-martial bill, as perhaps I may call it for short. I am wholly and unalterably opposed to such legislation, and very much value the opportunity you give me to say so. I think that it is not only unconstitutional, but that

[3] With respect to spies see *U. S.* v. *McDonald*, 265 Fed. 754 (E. D. N. Y., 1920).

[4] *Congressional Record*, Vol. 56, Pt. 5, p. 5120. The above description of the bill was made by Senator Brandegee (*ibid.*, Pt. 6, p. 5402).

[5] *Ibid.*, p. 5402.

[6] *Ibid.*, p. 5472.

[7] *Senate Resolution* No. 228, *Congressional Record*, Vol. 56, Pt. 6, p. 5401.

in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America, and, in view of the recent legislation, the Espionage bill, the Sabotage bill, and the Woman Spy bill, I think it unnecessary and uncalled for.

I take the liberty, my dear Senator, of expressing myself in this emphatic way, because my feeling is very deep about the matter. . . .

WOODROW WILSON.[8]

At that time Wilson was at the height of his power. His opposition to a bill meant its defeat, and certainly there was nothing equivocal about the above statement. The letter was a death blow to the use of martial law during the war period, Senator Chamberlain later withdrew his bill, and the question was never again raised in the Senate.

Such, in brief, are the events concerning the use of martial law that occurred during the World War. In fact, its use was never attempted. The conclusion that may be gathered is that martial law will probably never be used in the United States upon a national scale, except at a time of absolute necessity, probably only when a foreign invasion will make its use imperative. However, there is reason to believe that under these conditions the Supreme Court would hold its use constitutional upon the ground of an emergency exercise of an inherent power, the same ground upon which the Supreme Court justified the emergency acts that were passed upon during the progress of the World War.

THE RESORT TO PUNITIVE MARTIAL LAW BY TEXAS AND NEBRASKA

As a result of war-time fervor and the Supreme Court's failure to make any pronouncement concerning its use, martial law in its punitive form was used in both Texas and Nebraska in the years that immediately followed the World War. Its use in these states marked a return to that type of martial law declared on Paint and Cabin Creeks. Probably it would never have been done except for the influence of the war.

During the years that followed the World War, martial

[8] *New York Times*, April 23, 1918.

law was often used in Texas. The reasons for its use were many and varied. Once it was declared to prevent further casualties in a race riot between whites and blacks. At other times it was used to protect property from looting after a hurricane, to keep order during strikes, to restore respect for law in newly developed oil fields, and, more recently, to regulate the production of oil.[9] In no instance was qualified martial law declared. One lawyer, describing the type of martial law declared in Hutchison and Berger counties in 1929, said: "He [Dan Moody] did *not* say, 'I declare *qualified* martial law.' He did not say, 'I declare martial law subject to the following qualifications.' He *did* say, *'I do declare martial law'* complete, unqualified, subject to no restrictions."[10]

The use of martial law in Galveston in 1920 was sustained by the federal district court, and by its use military tribunals were established for the trial of civilians. Early in that year a longshoremen's strike in Galveston brought violence, and the business of the town was greatly disrupted. As a result of these conditions Governor Hobby of Texas issued the following proclamation:

> WHEREAS the congestion in the movement of commerce through the port of Galveston is preventing the receipt of goods by Texas merchants and threatening the outward shipment of Texas crops almost ready for market, and this condition has reached proportions affecting the business interests and material welfare of Texas and the property rights of citizens; and
>
> WHEREAS this condition has heretofore caused acts of violence on citizens of the State and there is now imminent danger of insurrection, tumult, riot and breach of the peace, and serious danger to the inhabitants and property of citizens in the territory hereafter described. . . .
>
> Now, THEREFORE, I, W. P. HOBBY, Governor of Texas and Commander-in-Chief of the Military forces of the State, do, by virtue of the authority vested in me under the constitution and laws of the State, declare that the conditions above described are clearly violative

[9] For an account of the use of martial law in each case see Jacob F. Wolters, *Martial Law and Its Administration.*

[10] *Ibid.*, p. 23, the argument of Paul D. Page, Jr.

of the constitution and laws of the State. . . . I do declare martial law in said territory.[11]

The proclamation was followed by another which suspended city officials and made provision for military authorities to enforce the law in the military zone. Not only were civil laws enforced by the military, but also certain rules that regulated the activities of the citizens of Galveston were issued under the authority of the military commander.

A mass meeting in opposition to this use of martial law was called by the city fathers. The military commander refused to permit the gathering to take place, and the meeting was called off. The city officials said in calling off the meeting that they were bowing to a superior force. This action left the military in complete control of the city, and a military court was set up for the trial of all offenses against both civil and military regulations.

William McMaster, a citizen of Galveston, was arrested by the military force for the violation of a traffic ordinance. The offices and courts having been taken over by the troops, he was tried before the provost judge and was fined, but he was committed to jail in default of payment. McMaster petitioned the Federal District Court for a writ of habeas corpus, claiming that his trial was illegal and that he was deprived of his liberty in violation of his constitutional rights. It was maintained, on the other hand, that the trial was properly conducted since the Governor had declared martial law and suspended the city officials who had "failed, refused and neglected to preserve the peace," and that the commanding officer had issued an order directing the provost marshal to take charge of the police work formerly done by the city.

Judge Foster in this case[12] declared that the governor of Texas had the power to call out the militia in case of insurrection and that the question whether there had been an insurrection was one for the governor to decide and not for the court. Continuing his line of argument, the Judge said: "Since he

[11] *Ibid.*, p. 58.

[12] *United States* v. *Wolters*, 268 Fed. 69 (1920).

had the authority to institute martial law, notwithstanding there is no statute of the state of Texas authorizing him to do so, he could do anything necessary to make his proclamation effective."[13] Did this include the suspension of civil officers and the establishment of military courts? The Judge thought so, for it was stated that the Governor had power "to suspend the officers of the city for failure and refusal to execute the laws, and to institute a military court to take the place of a municipal court, whose officers were suspended, with jurisdiction to enforce the ordinances of the city."[14] The petition for a writ of habeas corpus was denied, and the court upheld this method of administering martial law.

It will be noticed immediately that this case upheld the use of military tribunals for the enforcement of municipal law and not for the punishment of civilians for the violation of military rules. In this way it might be distinguished from *State* v. *Brown*. However, the decision clearly gave moral support to the use of military courts whenever martial law is declared in industrial disputes.

In 1922 martial law was used in Nebraska in a form similar in many respects to the type that was used in Galveston. The Governor of Nebraska declared martial law in Nebraska City; the militia was called out, and a military commission was authorized to try offenses against the public peace and violations of any military rules and regulations that might be established. Subsequently, two citizens were tried before the military commission; one was found guilty of keeping arms and ammunition, and the other was convicted of keeping open a prohibited place of business. While these men were still serving the sentences meted out to them by the military tribunal, the Governor declared martial law at an end and withdrew the troops. The two prisoners, thereupon, petitioned for a writ of habeas corpus contending that their sentences infringed the rights guaranteed to them in the Fourteenth Amendment. Among other claims the petitioners maintained that the military commission did not have the authority to try them and that, even if the com-

[13] *Ibid.*, p. 71. [14] *Ibid.*, p. 70.

mission did have the power, no sentence could outlast the period of military occupancy.

The opinion of the federal district judge[15] was that the declaration of martial law and the description in the proclamation of conditions of lawlessness and disorder had been "equivalent to a declaration of the existence of that organized resistance to authority known as 'insurrection.'" At such a time, the court believed, martial law became necessary and the will of the commander supreme within the area of the disturbance.

Did this power include the establishment of military tribunals for the trial of civilians? In this particular case the opinion went so far as to uphold the establishment of military tribunals, notwithstanding the fact that the civil courts were open in the military zone. The opinion stated: "No doubt the commander may avail himself of the courts as a means of trial, but he may also institute tribunals during the emergency to deal with offenders in the district. . . . This is especially true of offenses against the military regulations, such as these petitioners committed, acts which are not offenses against the laws of the state."[16] Would a sentence imposed by such a court deprive a person of his liberty without due process of law? The opinion, in answering this question, stated that "due process of law depends upon circumstances and varies with the subject-matter and the necessities of the situation, and imprisonment of citizens by the military commander may be lawful in some cases."[17]

The last question passed upon by the court was whether the individuals should continue to serve their sentences after martial law had been brought to a conclusion in the district. The court confessed that it was able to find little information upon this subject in any court decisions, but in agreement with the other conclusions rendered in this opinion, the court stated: "If the punishment is inflicted but a few days before the establishment of peace, it would seem absurd that sentences, otherwise just should at once expire. While the necessity for crush-

[15] *United States* v. *Fischer*, 280 Fed. 208 (1922).
[16] *Ibid.*, p. 211. [17] *Ibid.*, p. 210.

ing of further resistance may have passed, the reason for continuance of sentences theretofore given has not ceased."[18]

In these two cases the type of martial law was similar to that used in West Virginia—that type approved by the Supreme Court of West Virginia in *State* v. *Brown*. The Nebraska case even permitted the use of martial law courts when the civil courts were open. The only possible justification for the court's position was that, to the best of its belief, the civil courts were not in the proper exercise of their jurisdiction. These two decisions, however, gave much support to the doctrine of emergency power and the right of the executive branch to resort to extraordinary means in times of crises.

[18] *Ibid.*, p. 212.

Chapter IX

THE POSITION OF STATE OFFICERS WHO DECLARE AND EXECUTE MARTIAL LAW

In recent years there has been a marked tendency for the governors of the different states to declare martial law more frequently and on less provocation than formerly. Martial law, it is true, has not been used on so wide a scale as was practiced during the mining strikes in West Virginia and Colorado, but instances of its use have been far more numerous. Many cases have been carried to both the state and federal courts. In this chapter consideration must be limited to the pronouncements of the courts and to brief accounts of the facts leading up to the actual use of martial law.

Major developments in the last few years with respect to the use of martial law have been: first, the refusal of certain courts to recognize and approve qualified martial law; second, the acceptance of the power of the federal courts to pass upon the necessity for the declaration of martial law by a state executive; third, the use of martial law as a means to secure better economic conditions; and fourth, a new use of martial law during industrial disputes.[1]

QUALIFIED MARTIAL LAW AND THE POSITION OF THE SOLDIERS WHO EXECUTE IT

Although the powers and position of the military forces in quelling an insurrection or preserving order have been subjects of controversy for many years, in recent times the differences of opinion have become even more acute. One reason for this condition has been the inability of the military officers and of the courts to differentiate between the position of soldiers who have executed qualified martial law and those who

[1] The first three points are considered in the pages that immediately follow. The fourth point is considered in Chapter X.

have acted simply as aides to the civil officers. Whenever disorders have occurred and the use of troops has become necessary, there have been three distinct classifications in which the soldiers might find themselves: (1) when the militia has been called out for the purpose of aiding the civil authorities, martial law has not been declared and the troops have simply acted as peace officers; (2) when qualified martial law has been declared, either the soldiers have turned offenders over to the civil courts for trial or have kept them in detention until the restoration of peace; and (3) when punitive martial law has been declared and the military commander has been permitted to establish military courts for the trial of offenders against whatever rules that might be established, the troops have been limited only by the orders of superior officers. Confusion frequently has been due to the difficulty of the soldiers, and even the courts, in distinguishing between troops, acting when qualified martial law has been declared, and when acting as peace officers alone.

When troops have been called out to enforce the law and martial law has not been declared, the civil officers have given orders and the soldiers have acted as police officers in carrying them out. These soldiers have had the same responsibilities and have been subject to the same limitations as have been placed on civil officers in the enforcement of civil law. Many instances have occurred when the military forces have acted above the law, claiming that the rules governing them were different from those governing civil officers. All this has resulted in a movement to abandon the use of qualified martial law and an attempt on the part of the courts to define and limit the position and powers of troops called out merely to give assistance to the local law-enforcing agencies. The use of troops in this form has not been discussed previously in this study, for martial law has not directly been concerned. However, since confusion has arisen over the use of troops in this fashion when qualified martial law has been declared, some explanatory statements are necessary.

One of the early cases on this subject was that of *Ela* v.

Smith.[2] This case resulted from an attempt to enforce the fugitive slave law in Boston. A riot resulted and the militia was called out. Ela was injured by the soldiers, and brought suit to recover damages. The court's opinion was that the mayor had had full power to call out the militia and that the soldiers had been subject to his orders. At the same time the court was careful to state that the calling out of the militia "does not even enlarge the power of the civil officers by giving them any military authority; but only places at their disposal, in the exercise of their appropriate and legal functions, an organized, disciplined and equipped body of men."[3]

Troops have been frequently used in this fashion. The success of this mode of procedure has caused many courts to frown upon the use of martial law, particularly during industrial disputes or minor disturbances.[4] In 1911 the Supreme Court of Kentucky refused to recognize qualified martial law and placed the same responsibilities upon the military as were placed upon civil officers, when the military acted as aid to the local officers. At that particular time the militia was called out by the Governor of Kentucky to put an end to certain raids that were being made by a group of men called "nightriders." Martial law was not declared in any form. In *Franks* v. *Smith* the Kentucky court laid down certain rules to govern soldiers on duty at such a time. The facts of the case are as follows: Smith, a citizen of Kentucky, was arrested by the military and was turned over to the civil officials for trial. The charges proved to be unfounded, and suit was brought for false arrest. The decision of the court was to the effect that the governor had full power to call out the troops. "Whatever the reason that may exist for the failure or inability of the local civil authorities to suppress violence and disorder, when it comes to pass that they cannot or will not do it, then it is not only the

[2] *Ela* v. *Smith*, 5 Gray (Mass.) 121 (1855). [3] *Ibid.*, p. 140.

[4] *Chapin* v. *Ferry*, 3 Wash. 386 (1891); *Manley* v. *State*, 62 Tex. Crim. 392 (1911); *Manley* v. *State*, 69 Tex. Crim. 502 (1913); *Orr* v. *Burleson*, 214 Ala. 257 (1926). In *Chapin* v. *Ferry*, the court stated that although the troops were used as aid to the civil authorities, the troops did not become a part of the sheriff's *posse comitatus* but were still in the service of the state.

right but the plain duty of the Governor to act."[5] It was stated that when he had acted in this manner, he had acted as a civil officer and not as commander-in-chief of the army. Under these conditions "a member of the state militia, while in active service, under command of his superior officer, has the same power as a peace officer of the state, being entitled to the same immunity as is afforded to such officers in the performance of their duty."[6]

The court openly stated that it did not agree with the *In re Moyer* and the *Shortall* decisions. Here there was no martial law, nor did the court believe that there was any such thing as qualified martial law. As a result of this opinion, soldiers called out to aid local officers in Kentucky were bound by the same rules that governed the civil officers. Qualified martial law was not recognized, and the opinion implied that martial law itself could be used only when the civil courts were closed.[7]

This decision served as a precedent for the courts of Michigan and Minnesota in giving opinions defining the position of military officers called out to aid civil authorities when no martial law had been declared. While these cases are not directly concerned with martial law, they merit notice for the fact that the use of qualified martial law was outlawed in both states by these decisions.

The first case arose in Michigan when civil officers asked the Governor for aid in enforcing prohibition. There was no open insurrection, nor was martial law declared. The Governor honored the request and sent certain members of the state militia to aid the local officers. In order to prevent the transportation of liquor, a highway was obstructed and warnings were posted to inform users of the highway of this action. In the case of *Bishop* v. *Vandercook*[8] the plaintiff failed to see the warnings or ignored them and crashed into a log that had been placed across the road. He brought suit to recover for damages to the car and for personal injuries. The commanding officer

[5] *Franks* v. *Smith*, 142 Ky. 232 (1911), p. 240. [6] *Ibid.*, p. 232.
[7] *Ibid.*, p. 242. See also *Fluke* v. *Canton*, 31 Okla. 718 (1912).
[8] *Bishop* v. *Vandercook*, 228 Mich. 299 (1924).

claimed that these acts were done while he was enforcing qualified martial law under the direction of the governor and that he was not responsible.

It was the opinion of the court that there had been no use of martial law since the civil courts had all been open. In answer to the argument that, by the *Shortall* case, no declaration of martial law was necessary to relieve the militia from prosecution by civil authorities for acts committed in carrying out orders of superior officers, the court stated: "There is no such thing as 'qualified martial law.' There is no middle ground or twilight zone, between government by law and martial rule."[9] The troops merely supported the civil authorities, and "The power of the military in time of peace has been fixed beyond cavil as being no more than an aid to civil authorities in executing the law."[10] In this case, therefore, it was the opinion of the court that the military officers were not relieved of liability for "injuries wantonly planned and wilfully executed."

United States v. *Adams*[11] was a case before the Federal District Court in which the points of law were very similar to those in *Bishop* v. *Vandercook*. Certain individuals were detained in custody by the militia called out by the Governor of Colorado to help preserve order. Martial law was not declared. These individuals contended that a writ of habeas corpus should be granted by the court since their detention violated the due process of law clause of the Fourteenth Amendment.

In giving the opinion of the court the judge stated:

> It seems to me there either must be martial law or no martial law, and, until there is, no rogotary body can lawfully go around in this state, depriving individuals of the rights that the Constitution, both state and federal, guarantees. We have either one thing or the other. The two can not exist side by side. . . .
>
> In my opinion, the state authorities must take one of two positions: Either that martial law is justified and declared, and the territory taken over, and the civil made subordinate to the military,

[9] *Ibid.*, p. 309.
[10] *Ibid.*
[11] *United States* v. *Adams*, 26 Fed. (2d) 141 (1928).

or else they must recognize the civil power, and allow it to deal with the situation.[12]

It was the conclusion of the court, therefore, that when local civil officers and government continued to function, notwithstanding alleged lawless conditions due to strike, arrest and detention by militia under order of the governor were unauthorized, and violated the Fourteenth Amendment.

In spite of the above decisions, qualified martial law has still been used in many states. An instance of its use occurred in New Mexico when Governor Seligman declared martial law in McKinley County. As a result of this declaration, a man named Roberts was detained in custody of the military officers for keeping alive the insurrection and fomenting trouble. Roberts was not tried by a military tribunal, and the Adjutant-General intended to release the prisoner as soon as the disturbance was over.[13] Roberts sued for a writ of habeas corpus, maintaining that martial law was not used in McKinley County and that it could not be used under the constitution of New Mexico and the United States.

The main contention of the lawyers for Roberts was that the military could be used only as aid to civil forces or as deputy sheriffs or constables. It was shown to the satisfaction of the court that troops had been sent into the district at a time when the local officers had been unable to maintain law and order and when the Governor had found a state of insurrection to exist. Under such conditions the court would not accept the contention that the soldiers were, in effect, deputy sheriffs or constables.[14]

The opinion of the court also was that the Governor had exercised his power in a proper fashion when he had declared that a state of insurrection existed. "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for, without

[12] *Ibid.*, p. 144.

[13] See statement of facts in the case of *State* v. *Swope*, 38 N. Mex. 53 (1933).

[14] *Ibid.*, p. 57.

such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the executive in the exercise of his authority to maintain peace."[15]

The use of qualified martial law in any state depends not only upon constitutional provisions but also upon the attitude of the courts in each individual state. The instances given here show the truth of this statement. Qualified martial law is still being used in many states, and rightfully so. True, the governor should be careful to state by proclamation or otherwise that the troops are being used in this limited sense and at times should state the rules under which the military forces are to exercise their powers. If the executive believes military courts are necessary, in a time of war, he can have them established by the use of punitive martial law. If he wishes simply to hold offenders in custody until the conclusion of the disturbance, he can do this also. It is largely a question of degree.[16] Difficulty seems to arise over the arbitrary action of troops, called out to restore order when martial law is not declared. Once a set of rules has been formulated to govern the use of troops during domestic disturbances—when martial law is declared and when no martial law is declared—much of the present confusion will disappear. In the meantime some courts are defining and limiting the powers of troops who aid civil authorities, while in other states punitive martial law is declared the only recognized form of martial law.

THE STERLING V. CONSTANTIN DECISION

One of the most difficult problems that accompanies the use of martial law is that of securing a safe depository for the

[15] *Ibid.*, p. 56.

[16] Charles McCamic holds a similar view: "In Idaho and Colorado, the ones arrested were not tried but were placed in detention camps. In West Virginia they were tried by military courts and imprisoned. The difference is only one of degree, not of method" ("The President and Military Power in Emergencies," *West Virginia Law Quarterly and the Bar*, XXXIX, Dec., 1932, 37).

power of determining when martial law shall be declared. The danger is the possible abuse of this power, and nothing is more contrary to the American concept of liberty than the arbitrary and unjustified use of martial law. Of course, the duty of deciding when martial law shall be used has been placed upon the executive branch; and certainly when used at the proper time and in the proper manner, it is a valid instrument of democratic government. There is a constant temptation, however, for executive officers to use martial law during no insurrection or war in order to secure more easily a desired objective. Limitations upon the use of martial law—that it must be used only in time of insurrection or of war, when the civil courts are not functioning properly—have proved to be binding upon certain executives. Upon others, who believe that economic necessity calls for such stringent measures as military necessity, or who desire to use this power for such purposes as to carry out certain campaign pledges, the limitations have been enforced by the courts. The economic depression was the occasion for the use of martial law upon a new scale. State executives at times made use of martial law for economic reasons. Many courts passed upon this point and at the same time gave opinions concerning the review of this executive action by the courts. The most famous case was that of *Sterling* v. *Constantin,*[17] but there were other state and federal decisions upon this vital subject.

One of the gravest problems that arose during the depression concerned the overproduction of oil and the drop in price of this commodity to ten and fifteen cents a barrel. As new oil fields were discovered, the flow of crude oil increased. All producers were afraid to discontinue production, for otherwise a well located on adjoining property could drain the oil that was properly their own. As a result, although the demand for oil dropped daily, production continued at a very high level. The producers tried to limit production by voluntary agreements among themselves, but such action failed because some would not become a party to the agreement. Thereupon the

[17] 287 U. S. 378 (1932). These cases are considered in the present chapter.

state governments were called upon to save the oil industry from ruin. Since the fields most vitally affected were those located in Texas and Oklahoma, Governor Murray of Oklahoma and Governor Sterling of Texas were asked to take immediate action—to limit the production of oil and incidentally to raise its price.

In August, 1931, Governor Murray issued an executive order forbidding production and declaring martial law in a district fifty feet round each closed oil well. This action was taken pursuant to certain legislative authorization, the purpose of which was to secure the conservation of natural resources. However, "There was little pretence that the regime of martial rule was established for any other reason than to control production in order to raise the price of crude oil. The Governor admitted this in statements given to the press when he said that if the price goes up to one dollar to two dollars a barrel that that is just what was desired."[18] Promises were made to terminate the military control as soon as the price reached one dollar per barrel.

This use of martial law was not immediately considered by the courts. The United States Supreme Court in *Champlin Refining Company* v. *Corporation Commission of Oklahoma*[19] upheld proration orders of the Commission as a conservation measure, but did not pass upon the action of Governor Murray. Consequently, the regulation of production in Oklahoma was approved as a conservation measure, but the use of martial law was not passed upon by the courts until a later date.

In Texas the same condition of overproduction of oil existed. In order to prevent overproduction, the Railroad Commission of Texas issued orders regulating production. These orders were held invalid by the Federal District Court because the state legislature of Texas had never delegated such power to the Commission. The court also though that the purpose of the orders of the Commission was not to conserve crude oil but

[18] Elmer E. Smead, "Martial Law in the Oil Fields of Oklahoma and Texas," *Oklahoma State Bar Journal*, VI (April, 1935), 6.

[19] 286 U. S. 210 (1932).

to raise the price of it. "Disregarding pretense, subterfuge, and chicane, courts must, looking through form to substance, ascertain the true purpose of a statute not from its recitals of purpose, but from the operation and effect of it as applied and enforced."[20]

A special session of the legislature was then called by Governor Sterling, and a new law was passed in August, 1931.[21] Immediately thereafter Governor Sterling declared martial law, stating that his action was to fill in the gap until the Commission could issue regulations under its new legislative grant. The proclamation placed certain counties under martial law and directed Brigadier-General Wolters to assume supreme command.

In order to nullify this action, E. Constantin and others secured from the Federal District Court an injunction which restrained the state officers from limiting production of oil below five thousand barrels per well per day. Under the protection of this order, the wells were opened for a short time; but the Governor, believing that he and his aides, unlike the Railroad Commission, were not amenable to the court order, continued to regulate production. By a series of orders the production of oil was finally reduced to 125 barrels of oil per well per day. The Governor claimed that the oil fields were in a state of insurrection against the conservation laws of the state. No military tribunals, however, were established, nor was punitive martial law used. In taking his case to the federal courts Constantin, because of these facts, forced an opinion upon the use of martial law.

The Federal District Court, without passing upon the declaration of martial law by the Governor, issued a restraining injunction against the state officers. It was apparently the decision of the court that, notwithstanding the declaration of martial law by the Governor, the troops had been used only to give aid to the civil authorities and that martial law had not

[20] *MacMillan* v. *Railroad Commission of Texas*, 51 Fed. (2d) 400 (1931), 404.
[21] *Texas General and Special Laws*, 42 Leg. 1st Called Session, 1931, p. 46.

existed. Therefore, the military officers were in effect civil officers, and their acts were subject to review by the courts.[22]

The unanimous decision of the Supreme Court of the United States in the case of *Sterling* v. *Constantin* placed both the initiation and exercise of martial law in the sphere of the federal courts. This case left only the declaration of martial law and the control of the militia free from court interference, for all acts done in carrying out martial law have become subject to judicial review.[23]

This case is important primarily because it sets certain limits, potentially at least, to the executive's decision that an emergency exists that warrants the use of martial law. To the student of government it is an illustration of the struggle that exists between private rights and the general welfare,[24] while the constitutional lawyer attributes great importance to the fact that in this case the Court questioned the judgment of the executive branch and determined whether this so-called discretionary power had been exercised in a proper manner.

Governor Sterling and his counsel maintained that the governor like the President had the power to proclaim martial law and that to give the courts the power to review the executive's action was to destroy separation of powers. They believed that, in case the executive acted despotically, the proper remedy was impeachment. They held that the taking by military authority of any property constituted due process of law and that the soldiers who enforced the rules were not acting as civil officers. The lawyers for the defense believed that: first, there was no insurrection and that martial law could not be used; second, there was not even a threat of insurrection; third, that the courts were open and functioning properly and that their client

[22] *Constantin* v. *Smith*, 57 Fed. (2d) 227 (1932), p. 241.

[23] See "Constitutional Law—Conclusiveness of Governor's Proclamation of Martial Law and Orders made Pursuant Thereto," *University of Pennsylvania Law Review*, LXXXI (Feb., 1933), 468.

[24] *Sterling* v. *Constantin*, 287 U. S. 378 (1932), 380-386; "Constitutional Law—Due Process—Military Orders Limiting Production of Petroleum," *Detroit Law Review*, III (March, 1933), 114.

should therefore receive protection from these arbitrary acts that had violated the Fourteenth Amendment.[25]

Chief Justice Hughes in his opinion agreed with the District Court that there had been no insurrection or conditions that even remotely had resembled a state of war. He also upheld the jurisdiction of the federal courts in the case, for not even state officers could disregard the rights guaranteed by the Federal Constitution. "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable."[26]

The opinion recognized the fact that the Court was passing upon questions not only of law but of fact—actually upon a discretionary power of an executive official. Justification for this procedure was based on the fact that "when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of federal right."[27]

At the same time the Chief Justice was aware that the governor must use the militia at times to secure the proper enforcement of the law. He was also cognizant of the fact that the power implied a range of honest judgment as to the measures that might be used to enforce the law, for, without such liberty, the power itself would be useless. The opinion continued: "It does not follow . . . that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of

[25] *Sterling* v. *Constantine*, 287 U. S. 378 (1932), 380-386.
[26] *Ibid.*, pp. 397-398.
[27] *Ibid.*, p. 398.

private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case are judicial questions."[28]

The conclusion of the Court, therefore, was that the facts of the case failed to justify the declaration of martial law. There was no exigency that had justified the Governor's interfering with an order of a federal court, for "the proper use of that power in this instance was to maintain the federal court in the exercise of its jurisdiction and not to attempt to override it."

To the person interested in martial law, the decision is interesting but at the same time disturbing. Certainly it extends the federal power beyond the guarantee of a republican form of government. "Its policy as precedent is not beyond question, although the result reached seems justified on the facts."[29] The decision leaves the state executive powerless to cope with certain emergencies unless the executive proceeds without regard to possible judicial action. Here the Court took upon itself the judgment of the very fact of the emergency—questions that previously had been regarded as political. The justification of the Court's action was that martial law in this case interfered with judicial procedure at a time when its use was unnecessary, and therefore a halt had to be called upon this expansion of executive power.[30] It is the opinion of one writer, however, that notwithstanding the above opinion "economic emergencies conceivably might make reasonable summary action by the executive designed to rehabilitate industry, and neither the novelty of the means nor the absence of a threat of unusual violence should invalidate the fiat."[31] In the future, however, judicial review of executive action may be expected whenever martial law is declared. Not always will the court be called

[28] *Ibid.*, pp. 400-401.

[29] Ernest D. O'Brien, "Constitutional Law—Due Process—Martial Law," *Michigan Law Review*, XXXI (May, 1933), 991.

[30] See Charles Fairman, "Martial Rule, in the Light of Sterling v. Constantin," *Cornell Law Quarterly*, XIX (Dec., 1933), 20.

[31] "Martial Law," *Columbia Law Review*, XXXII (June, 1933), 1074.

upon to decide upon the necessity, and sometimes the courts will uphold executive action, but the fact remains that the freedom of the executive has been greatly limited by the decision in this case.[32]

[32] In Oklahoma where Governor Murray had called out the militia to enforce the conservation laws of the state, petition for an injunction was asked for in the Oklahoma courts to restrain the militia from taking private property. The decision of the Supreme Court of Oklahoma was based on the principles of law stated in the Constantin case. The Oklahoma court admitted that the Governor had the power to call out the militia in order to see that the laws of the state were faithfully executed, but stated that the militia could be enjoined from taking private propery from an individual without due process of law. In the words of the Court: "The Chief Executive of the state does not relieve the courts of their duty to construe and apply the laws by placing a construction upon the laws and by calling out the militia to enforce that construction thereof. The duty of the Chief Executive to cause the laws to be faithfully executed vests him with the discretion to determine whether or not an exigency requiring military aid for that purpose has arisen. His decision of that question is conclusive upon the courts of this state, but, when the militia is called out for the purpose of enforcing the laws of the state, its actions, which operate to deprive owners of their property without due process of law, are subject to review by and to the control of those courts." *Russell Petroleum Co.* v. *Walker,* 162 Okla. 216 (1933).

Chapter X

THE CONTEMPORARY USE OF MARTIAL LAW

THE AFTERMATH OF THE *STERLING* V. *CONSTANTIN* DECISION

IN THE CASES that have arisen in the state and lower federal courts since the *Sterling* v. *Constantin* decision, little hesitancy has been shown by the courts in passing upon the necessity for the declaration of martial law by the executive. If any lawyer in his brief has doubted the power of the court to judge the necessity, a single reference to the opinion of the court in the *Constantin* case has frequently proved sufficient to refute his argument. Often the courts have justified the action of the executive, and up to the present time it is possible to say that they have outlawed only the unwarranted exercise of executive power.

In the New Mexico case of *State* v. *Swope,* the opinion of the court, while admitting that the governor had a wide discretion in the steps that he might take in suppressing a revolt, stated: "Whether or not the executive or military force has overstepped the line is a judicial question."[1]

Judicial substantiation was also given by a federal district court to the declaration of martial law by the Governor of Minnesota.[2] Martial law was declared in 1934 as a result of trouble growing out of a truck drivers' strike. The facts showed that considerable violence had taken place. Being unable to maintain order, the local officers, including the mayor of Minneapolis and the sheriff of Hennepin County, had requested troops. In this request it was urged that the troops act as they might see fit and not under the direction of the sheriff.

Upon giving its opinion the District Court failed to cite a single case by name, although it referred indirectly to several cases. Since no doubt violence had occurred, the court had no

[1] *State* v. *Swope,* 38 N. Mex. 53 (1933), 57.

[2] *Powers Mercantile Co.* v. *Olson,* 7 Fed. Supp. 865 (1934).

difficulty in upholding the declaration of martial law by the Governor. The opinion of the court was that, given reasonable justification, the courts should always uphold the action of the governor and that a proclamation should be set aside only when the governor clearly acts in an arbitrary manner. In the words of the court: " . . . within the range of the Governor's permitted discretion, his acts are not subject to the regulation or control of the judiciary. Arbitrary and capricious acts of the Governor, and those having no relation to the necessities of the situation, may be enjoined by the courts, as any clear abuse or power by an executive may be enjoined."[3]

When Governor Paul McNutt declared martial law in Vigo County, Indiana, that county was the scene of industrial strife. The troops sent into the strike area were put in complete control of the situation. It was the opinion of the Federal District Court that the state of affairs had justified this action.[4] Requests for military assistance were directed to the Governor by local officials. After the receipt of these requests, and not before, the Governor had declared martial law.

The action of the executive was upheld by the judiciary since there was "no evidence of any arbitrary and capricious acts upon the part of Governor McNutt, but, on the contrary, the evidence shows that he acted clearly within his discretion, and to protect the lives and property of the citizens of Vigo county."[5]

It was only natural that certain labor groups and even certain disinterested parties were disappointed in the refusal of the courts to interfere with the use of martial law during industrial disputes. According to a statement in the *Columbia Law Review:* "The excessive use of militia in a period characterized by increasing labor militancy rather than by insurrectionary activity would seem to call for greater judicial vigilance. But the danger of unenlightened appraisal of the facts by the courts as well as the fact that slight delay usually means death to a

[3] *Ibid.*, p. 868.
[4] *Cox* v. *McNutt*, 12 Fed. Supp. 355 (1935).
[5] *Ibid.*, p. 360.

strike indicate the improbability of effective judicial relief against executive strike-breaking."[6]

In the instances given above, the judiciary in each case upheld the action of the executive branch. However, in South Carolina in 1935 there occurred an instance in which the Supreme Court of that state not only reviewed the action of the Governor but, like the United States Supreme Court in the *Constantin* case, found that the Governor's action was unjustified and contrary to the due process of law clauses in both the South Carolina and Federal constitutions.

The state of South Carolina, although overwhelmingly Democratic, was the arena for bitter intra-party strife. At the time of the declaration of martial law Governor Johnston was the leader of one political group, while the highway commission and other state administrative agencies were in the control of another. In his election campaign Governor Johnston had made a pledge that, if elected, he would remove the chief highway commissioner. The removal was a more difficult job than anticipated by him, for the highway commission refused "to get out." At last, after considerable bickering, Governor Johnston on October 28, 1935, declared a state of rebellion against the law of South Carolina in connection with the operation and general control of the highways of the state. The militia was ordered to take charge of the highways and the highway commission office. The proclamation suspended the writ of habeas corpus with respect to persons breaking any provision of the proclamation. The Supreme Court of South Carolina regarded this proclamation as a declaration of martial law.

The case of *Hearon* v. *Calus*[7] arose over the attempt of the Governor to remove the commission by the use of martial law, and the Supreme Court of South Carolina was compelled to pass upon this act of the executive.

The counsel for Governor Johnston argued that the declaration that a state of insurrection existed could neither be en-

[6] "Martial Rule—Suit to Enjoin Governor's Proclamation—Justification for use of Troops in Industrial Disputes," *Columbia Law Review*, XXXVI (March, 1936), 496.

[7] *Hearon* v. *Calus*, 178 S. C. 381 (1935).

joined nor reviewed by the court. However, the court held otherwise, chiefly because at the time of the proclamation South Carolina was peaceful and the courts were functioning in a proper manner. In answering the argument that the action of the Governor could not be reviewed by the courts, the opinion stated:

> when his acts exceed the authority given him by the Constitution and Statutes and are injurious to the personal liberty and property rights of citizens of the State, they are open to the inquiry and control of the judicial arm of the State. . . . If the power of the Governor, after his proclamation of the existence of a state of insurrection, is uncontrolled by any deterrent power of the government and is subject only to his caprice and will, what shall restrain him from depriving a citizen of his property or his liberty? To hold that he has such unlimited power, unrestrained by any force of law, would be subversive of every principle of freedom and liberty, and be an invitation and provocation to the insurrection and rebellion which it is the province and duty of the law to suppress.[8]

In conclusion, it is very noticeable that the courts, both state and federal, have made extensive use of the *Sterling* v. *Constantin* decision. Therefore, in the future whenever martial law is used, it may be expected that an appeal to the courts will be made on the ground that the actual conditions do not justify a resort to martial law and that the governor's actions are both unnecessary and unwarranted. Certainly the courts have added another burden to their long list of self-imposed tasks.

A NEW USE FOR MARTIAL LAW

Before the year 1936 troops were used in industrial strikes to prevent acts of violence, not only against the owners of property, but also against the group of nonstrikers who desired to continue working. At that time, however, troops were first used for the purpose of maintaining law and order by closing of the mill in which the strike was in progress. This new development is one of the greatest importance. If troops, in the future, first close mills for the purpose of avoiding violence,

[8] *Ibid.*, pp. 399-400.

then martial law will become an instrument that will be highly approved by organized labor. That this mode of procedure has received support from many different sources is proved by the events of the last two years; but, if labor ever reaches the point where, by acts of violence, it can force the government to close plants by the use of martial law, then the ultimate success of all strikes is assured.

In 1936 a strike was called in the Strutwear Knitting Company[9] located in Minnesota. Troops were ordered out to preserve order, but martial law was not declared. The troops, however, eventually took charge of the plant and closed it. The owners of the mill obtained an injunction restraining the military officers from interfering with the owners' possession of their property. The court believed that troops could not be used for depriving a person of his own property when he was abiding by law and conducting a lawful business. In the words of the court, "It [a state] cannot suppress disorders, the object of which is to deprive citizens of their lawful rights, by using its forces to assist in carrying out the unlawful purposes of those who create the disorders, or by suppressing rights which it is the duty of the state to defend."[10]

Notwithstanding this decision, which was not directly concerned with the use of martial law, the possibility of using this power for closing plants was not overlooked. In the summer of 1937 the United States experienced one severe strike after another. Several times martial law was used for the purpose of closing industrial plants—a startling new development in the use of martial law. Strikes occurred principally in the Middle West, but their effects were felt over the entire United States. First it was the automobile industry that felt the drive of the unions for collective bargaining; then in time came the steel industry with many other smaller strikes in other fields. Labor trouble continued for months. Certain large corporations in both the motor and steel industries came to terms with the labor organizations. The United States Steel Corporation,

[9] *Strutwear Knitting Co.* v. *Olson,* 13 Fed. Supp. 384 (1936).
[10] *Ibid.,* p. 391.

which employed approximately half of the steel workers, signed contracts with the Steel Workers Organizing Committee of the C. I. O., and other companies followed this example. However, three great steel concerns,[11] while expressing their willingness to bargain collectively, refused on principle to sign union contracts. Strikes immediately broke out in their mills, and many were forced to close. At the same time several unauthorized strikes broke out in other industries. The states of Michigan, Indiana, Illinois, Ohio, and Pennsylvania felt the full effect of these strikes. Business was disrupted, men were thrown out of work, and violence was widespread. Martial law was then called upon to restore that section of the United States to its normal condition.[12]

During the early stages of the strikes, the state executives showed great reluctance to use martial law. The first step taken to maintain order was to authorize local officers to augment the number of police in the hope that the use of the militia would not be necessary. The labor organizations had become very powerful. The administration at Washington was friendly disposed toward organized labor. Being of the same political faith, the state executives were slow to antagonize labor, and acts of violence were ignored that a few years previously would have occasioned an immediate declaration of martial law. Newspapers described certain disturbances as "pitched battles." Lives were lost and a great amount of property was destroyed. Business in the affected states was at a standstill. All of this caused many groups and individuals to write to both the state and federal governments urging that immediate action be taken to stop the violence and permit business to resume its normal state. An illustration of this procedure is the telegram sent to Governor Davey of Ohio by the Baltimore and Ohio Railway showing that their business had been hard hit and closing with the statement that "We earnestly implore you to immediately take such action as will restore our prop-

[11] Republic Steel, Inland Steel, and Youngstown Sheet and Tube Corporations.

[12] Martial law was declared in Pennsylvania and Ohio. Troops were used in other states without declaration of martial law.

erties to our peaceful possession and enable us to fulfill our obligations as common carriers."[13]

Notwithstanding many acts of violence, the governors of the affected states, either because of the objection of labor to the use of martial law or because of their own great reluctance to use it during industrial disputes, refused to declare martial law. Governor Davey called attention to this fact when he urged attendance at a steel peace conference. He maintained that the state of Ohio had done everything in its power to preserve order except to resort to armed troops.

While these events were taking place in Ohio, martial law was declared in Pennsylvania for a different purpose from that which would naturally be expected—to close the Cambria plant of the Bethlehem Steel Corporation. As a result of Governor Earle's action a strange phenomenon occurred.[14] Organized labor cheered the use of martial law, while the large corporations condemned its use in this form in no uncertain terms. In the Colorado coal strike of 1912, labor organizations condemned the use of troops during industrial disputes and maintained that during that strike the soldiers had received their pay both from the state and from the mine operators.[15] The Pennsylvania troops on entering Johnstown were greeted with cheers from organized labor, for now, instead of keeping the mills open, they were coming for the purpose of closing them.

The plant in which the strike was in progress was the Cambria plant of the Bethlehem Steel Corporation. On June 16, 1937, forty thousand workers had planned to stage a labor demonstration at Johnstown. Anticipating trouble, the sheriff of Cambria County telegraphed the Governor of Pennsylvania for aid. The Governor first asked Eugene G. Grace, the president of the corporation, to close the plant voluntarily, but

[13] *New York Times,* June 7, 1937. The appeal was directed to Governor Davey instead of the Interstate Commerce Commission because Commissioner Eastman held that the Commission had no police powers and that in this case the railroad was willing to give service but disturbances, which the local officers should control, prevented them from doing so.

[14] *New York Times,* June 20, 1937. [15] See p. 115.

when he refused, the Governor declared qualified martial law. The proclamation itself closed with the statement that he was putting the district under the police and military forces of the commonwealth and that the commanding officer had full power to force obedience to law.[16]

Governor Earle issued an explanatory statement to his proclamation. In this statement he explained that he had declared modified martial law because he was unwilling to wait until bloodshed occurred to take the steps necessary and proper. "We are only taking over policing, disarming of the vigilantes and the closing of plants. We have not taken over the courts and will not unless it is necessary, and I don't think it will be."[17]

The Governor ordered the state police to Johnstown to preserve order. The national guard was not called out. Attorney-General Margiotti of Pennsylvania had advised Governor Earle that it was "constitutionally legal" for him to declare martial law without ordering troops to the affected zone. In explaining his position the Governor stated:

> The National Guard, I consider, is for reserve purposes and to be used ultimately in case of invasion or in extreme emergencies such as the recent floods. I do not feel they should be called out for strike duty unless the police are found to be insufficient in number.[18]

This action of the Governor caused many different and violent reactions. Contrary to the usual case when martial law is declared, the strikers and their sympathizers were jubilant.[19] Production at the plant was stopped—the immediate goal of every strike. In their minds certain violence and bloodshed had been prevented by the Governor's opportune and wise action. City officials, business and professional men, and the press were overwhelmingly condemnatory of a declaration of martial law, since they maintained that it was both unnecessary

[16] The proclamation was issued June 19, 1937 (see *New York Times*, June 20, 1937). For full text of proclamation see *Johnstown Tribune*, June 19, 1937.

[17] *New York Times*, June 20, 1937. [18] *Johnstown Tribune*, June 19, 1937.

[19] The statement of David Watkins, regional director of the Steel Workers Organizing Committee, was: "Governor Earle has done the right thing" (*ibid.*).

and unwarranted.[20] The Bethlehem Steel Corporation itself stated that the mill was closed under duress and reserved its right to sue the state for damages and to take other legal action.[21]

Martial law in this particular case was of short duration. Governor Earle declared martial law on June 19 and revoked his proclamation exactly one week later. The unions objected to the revocation, claiming that violence was bound to occur, and all during the time martial law was in force they urged the Governor to stand firm. The corporation itself was greatly pleased at this new step, but it was the nonstrikers and citizens of Johnstown that probably exerted the greatest influence upon the state executive. Either because of the loss of business in Johnstown due to no payroll or to the subsidies of the mill owners, as claimed by the unions, these groups condemned the closing of the mill. They even went so far as to place full-page advertisements in the leading newspapers of the country asking for financial assistance and condemning Governor Earle's actions as "political maneuvers of an ambitious Governor."[22] The press objected to the use of martial law in this fashion because, as an editorial in the *New York Times* stated: "In this case the power of the State is not being used to make certain that all parties to a controversy conduct this controversy strictly within the limitations of the law. It is being used to prevent one party from pursuing a course of action which is entirely legal in itself, on the ground that this might provoke another party to resort to illegal action. This is a remarkable reversion of the customary uses of authority."[23] Whether its use was

[20] According to the *Johnstown Tribune,* June 19, 1938, "It violates every principle of democratic government." The following day this newspaper stated that "the picketers were jubilant." The same issue quoted a statement from the *Pittsburgh Press* which expressed a critical view of this use of martial law, for, "Instead of using martial law to break a strike, as in the past, the effect in this instance was to make the strike effective, which it had not been previously."

[21] *New York Times,* June 21, 1937. The June 22, 1937, issue contained a list of editorials from the Pennsylvania press upon the use of martial law.

[22] *Ibid.,* June 24, 1937.

[23] *Ibid.,* June 22, 1937.

The Senate Civil Liberties Committee made a thorough investigation of the use of money during this strike, but gave little attention to the use of martial law.

justified or not, this marked the first time that martial law had ever been used in Pennsylvania for the closing of a plant during an industrial dispute.

While these events were taking place in Pennsylvania, Governor Davey was having great difficulty in preserving law and order in Ohio. True, the plants of the Republic Steel Corporation and the Youngstown Sheet and Tube Company were closed in the Youngstown area due to the strikes, but a strong back-to-work movement had developed. When it became probable that the mills would reopen, the sheriff of Mahoning County requested the steel companies to keep their mills closed and to maintain the status quo. This request had the support of Governor Davey and Charles P. Taft, Chairman of the Federal Mediation Board. Notwithstanding these requests, the mills made preparations to reopen on June 22.[24]

Upon receipt of the information that the mills planned definitely to reopen, Governor Davey declared martial law and ordered the peace officers to prevent the opening of the mills and to maintain the status quo. This was a modified form of martial law, for its primary purpose was to prevent the reopening of the mills, and there was no hint of the establishment of martial law courts.[25]

The labor leaders had been afraid that conservative Governor Davey would not take this action and had telegraphed President Roosevelt: "In the name of God and overwhelming majority of steel workers of Youngstown we urge you to immediately intervene in this critical hour and avoid a calamity and disaster that Ohio may remember for decades."[26] The President continued his hands-off policy, refusing to interfere, but the Governor's action was sufficient to prevent the reopening of the mills.

The National Labor Relations Board tried desperately to bring about peace. All their efforts were of no avail, and the prospect of seeing the mills closed for an indefinite time changed public opinion. The steel companies, the nonstrikers, and the general public urged that martial law be revoked. The

[24] *New York Times*, June 22, 1937. [25] *Ibid.* [26] *Ibid.*

mayor of Youngstown objected on the ground that the cost of keeping the national guard in the strike zone had already reached fifty thousand dollars, while twenty thousand people in the Youngstown area who wanted work were deprived of their jobs.[27] The chief objection of the Citizens Committee was based upon constitutional grounds. In a prepared statement the Committee held: "It is reprehensible for the state government to excuse itself for the enforcement of the law upon the grounds that to do so will incite lawless persons to commit crimes and to destroy life and property. To take such a position is to admit that the will of the mob, and not the Constitution of the United States, had become the supreme law of the land."[28] This line of reasoning, according to the letter, would approve the government's action of closing banks on the pretext that it would prevent bank robberies.[29]

As a result of this attitude Governor Davey on June 25 altered his instructions to the national guard. Governor Earle had simply revoked martial law, but Governor Davey now kept the soldiers in the strike zone, not for the purpose of keeping the mills closed, but for the purpose of protecting the persons who desired to work. He gave permission for the mills to reopen and said: "The right to work is sacred. The right to strike is equally valid. Those who want to return to their employment shall enjoy that privilege without being molested. Those who wish to remain on strike certainly are entitled to do so, and to continue any and all lawful practices."[30] The troops were ordered to remain in the trouble zone until all danger of violence had disappeared.

The change of position was bitterly denounced by the C. I. O. Governor Davey had now become a strike-breaker, and the militia was nothing more or less than the company police. The Governor's action was challenged in the courts. John S. Mayo and three other members of the Steel Workers Organizing Committee filed suit in the Federal District Court for the Southern District of Ohio asking for an injunction to bar the Governor from using the national guard to break the

[27] *New York Times*, June 25, 1937. [28] *Ibid.*
[29] *Ibid.* [30] *Ibid.*

strike. The bill of complaint stated that the troops arrested citizens

without any justification whatsoever, and did cause approximately 200 citizens to be thrown into the County and City Jails, wherein they were kept incommunicado, without the right to counsel, and without any charges being placed against them; assaulted or caused to be assaulted many citizens in the State of Ohio and of other States, with blackjacks, billies and other instruments, while such citizens were being held in the aforesaid County and City Jails, in an illegal, arbitrary and unconstitutional manner. . . .

That the said . . . defendants . . . have created and established a roving military commission which has substituted itself for the civil authorities or aided and abetted and actively participated with the civil authorities in their unlawful acts as set forth hereinabove.[31]

Mayo contended that these actions violated the First, Fourth, Sixth, and Fourteenth Amendments, the Civil Rights Act, and the National Labor Relations Act. The court was asked to declare Governor Davey's proclamation "illegal, arbitrary, unconstitutional, null, void and of no effect whatsoever."[32]

According to the records of the district court the matter was heard, and three weeks were consumed in the presentation of evidence by the plaintiffs. At the conclusion of the presentation the case was dismissed on a motion made by the plaintiffs. No evidence was introduced on behalf of the defendants. As a result, there was no official judicial opinion upon the declaration and use of martial law by Governor Davey.

In a radio address delivered in the fall of 1937, Governor Davey made a detailed explanation of his actions:

Many people misunderstood these first orders, or completely overlooked all of them except number two which read "Steel plants which have been closed shall remain closed during the deliberations of the Federal Mediation Board, provided this period of time is reasonably limited."

Labor leaders were delighted because they thought the troops were sent there to help them win the strike. Employers and their

[31] Bill of Complaint of John S. Mayo *et al.* against Martin L. Davey *et al.*, in equity, No. 1218 (MS).

sympathizers were angered, probably for the same reason. All of them overlooked the fact that I had asked the President to intervene and that a mediation board had been set up. As a matter of simple courtesy and official decency, we had to hold the lines as they existed for a few days, in order that the mediation board might have every chance to succeed.

* * * *

Then came the last fateful day, Thursday, June 24th.

* * * *

Into the hands of the Adjutant General were placed the final orders in the following language:

* * * *

"In view of the failure of the peace negotiations in connection with the steel strike under the auspices of the Federal Mediation Board, we are confronted immediately with the problem of maintaining law and order.

"We can not waiver. Our clear duty is to give every assistance to the local authorities to prevent lawlessness of every description, as it relates to the strike situation, without which wholesale slaughter is almost inevitable. The rights of all citizens must be protected. The people as a whole sustain the government and make its continuity possible. Government must not abdicate its sovereign powers and responsibilities to any who challenge its existence.

* * * *

Finally about 11 o'clock word came that the Mediation Board had finished its work and announced the unfavorable result. I started to dial the 'phone to call the Adjutant General. . . . The Adjutant General came on the line and I said: "General Marx?" "Yes, Governor." "You may release the orders and proceed accordingly."

* * * *

The strike was ended. There was almost no trouble. Nearly all the men flocked back to work eagerly. Law and order had been maintained. The sovereignty of government had been upheld. The rights and liberties of the people had been protected.[33]

Governor Davey's defense was not accepted by labor. Mr. Edward Lamb, Ohio counsel for the Committee for Industrial Organization, replied to Davey's arguments in an address broadcast over a national network. He characterized the Gov-

ernor's action as that of a traitor and stated: "Governor Davey sent the troops into the Mahoning Valley . . . for the purpose of preserving peace. However . . . we showed that he issued private orders to the National Guard to break the strike."[34]

The precedents set by these two Governors in closing mills during labor difficulties will undoubtedly have great effect, notwithstanding Governor Davey's subsequent action.[35] As labor becomes more powerful and more firmly entrenched, it is possible that additional instances of the use of martial law for the closing of plants will occur, and martial law will become even more difficult to use impartially. What the future has in store no one can predict. The fact is inescapable that the use of martial law at times may be necessary. Possibly labor will welcome the use of martial law, but irrespective of the group it benefits, its use in an impartial manner during industrial disputes seems almost impossible.[36]

[34] *Ibid.*, Nov. 22, 1937.

[35] Other governors received requests to close certain plants during labor troubles. Governor Browning of Tennessee was asked by certain labor leaders to close the Alcoa plant of the Aluminum Company of America.

[36] During the period of time covered by this chapter there were three cases before state courts that incidentally concerned martial law. An opinion of the Iowa Supreme Court concerned the liability of officers enforcing martial law as compared with that of civil officers. The court stated "the overwhelming weight of authority does extend to the military officers under such conditions much greater latitude in the exercise of their discretion as to what means it is necessary and proper for them to employ than is possessed by civil officers in time of peace." *State* v. *District Court In and For Shelby County,* 219 Iowa 1165 (1935), 1187.

A command by the authority instituting martial law that a city enact permanent measures extending beyond the duration of the use of martial law is not legal justification for such a measure. In Oklahoma in 1933 a segregation order directed against blacks was enforced by martial law until the city passed a segregation ordinance. The military order was deemed immaterial in so far as the validity of the ordinance as an exercise of the police power was concerned, but it was held that the martial law decree afforded no justification whatever for the enactment of such an ordinance. *Allen* v. *Oklahoma City,* 175 Okla. 421 (1935).

In the case of homicide by a member of the state militia while in active service aiding the civil authorities what would be the proper court to have jurisdiction of the matter? The Missouri Supreme Court in 1935 held that the state courts and the court-martial established under the Articles of War would have concurrent jurisdiction. In the particular case before the court, the court-martial having first assumed jurisdiction, a writ of habeas corpus failed to secure the transfer of the case to the state courts. When the act occurred the troops were in active service and, according to the opinion, the court-martial would not lose jurisdiction should the emergency pass before the case came up for trial. *Ex parte McKitterick* v. *Brown,* 337 Mo. 281 (1935).

Chapter XI

OPINIONS AND CONCLUSIONS CONCERNING THE USE OF MARTIAL LAW IN THE UNITED STATES

THE DEFINITION of martial law sanctioned by the Supreme Court is "the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary, but it must be obeyed."[1] Birkhimer agrees with this view, for he holds that "martial law is the rule which is established when civil authority in the community is made subordinate to military, either in repelling invasion or when the ordinary administration of the laws fail to secure the proper objects of the government."[2] Mr. Charles Warren states:

> Martial law . . . is not statutory in character and always arises out of strict military necessity. Its proclamation or establishment is not expressly authorized by any of the provisions of the Constitution; it comes into being only in the territory of an enemy or in a part of the territory of the United States in time of war or in time of peace in which the proper civil authority is, for some controlling reason, unable to exercise its proper function.[3]

Wheaton maintains that "Martial law in this sense is merely a greater or less cessation, from necessity, of municipal law; and what necessity requires it justifies."[4] Finally, H. C. Car-

[1] *United States* v. *Diekelman,* 92 U. S. 520 (1876), 526. In the case of *In re Egan,* 8 Fed. Cas. No. 4303 (1866), the court said: "All respectable writers and publicists agree in the definition of martial law—that it is nothing more or less than the will of the general who commands the army. It overrides and suppresses all existing civil laws, civil officers and civil authorities, by the arbitrary exercise of military power. . . . Martial law is regulated by no known or established system or code of laws, as it is over and above all of them."

[2] William E. Birkhimer, *Military Government and Martial Law,* p. 291.

[3] Charles Warren, "Spies, and the Power of Congress to Subject Certain Classes of Civilians to Trial by Military Tribunal," *The American Law Review,* LIII (March-April, 1919), 201-202.

[4] Henry Wheaton, *Elements of International Law,* 6th ed., ed. A. Berriedale Keith, II, 784.

baugh observes: "It is the will of the commander, limited by the laws and customs of warfare as recognized by civilized nations, and sometimes restrained by the orders of his military superior or the sovereign authority under which he operates."[5] From these definitions it may be concluded that martial law is the law of necessity, and that, in the last resort, it is nothing more or less than the will of the authorities to whom has been given the power of instituting martial law.

A fundamental question with relation to the use of martial law is whether its use is in harmony with the Constitution or whether it is extraconstitutional and by its use suspends the Constitution itself. Long ago Dr. Francis Lieber wrote as follows:

> As to martial law at home, which may become necessary in cases of foreign invasion, as well as in cases of domestic troubles, it has full sway in the immediate neighborhood of actual hostilities. The military power may demolish or seize property, or may arrest persons, if indispensable for the support of the army, or the attaining of the military objects in view. . . . This operation of martial law is neither exclusive or exceptional. Any immediate physical danger, and paramount necessity arising from it, dispenses with the forms of law most salutary in a state of peace.[6]

He therefore concluded that no law could limit the use of martial law in every case and that when used it was paramount to all else. G. N. Lieber held a similar view:

> It has also been asserted that the principle that the constitutional power to declare war includes the power to use the customary and necessary means effectively to carry it on lies at the foundation of martial law. I cannot agree to this proposition. It is positively repudiated by those who justify martial law on the ground of necessity alone, and the Supreme Court stands committed to no such theory. It is contended that martial law may be authorized by Congress or resorted to by the President or by his officers without such authorization, and that in either case its justification is necessity, and that though it be authorized by Congress the officer who

[5] H. C. Carbaugh, "Martial Law," *Illinois Law Review*, VII (March, 1913), 495.

[6] G. Norman Lieber, "What is the Justification of Martial Law?" *North American Review*, CLXIII (Nov., 1896), 558.

enforces it is liable to have his acts judicially investigated and measured by the rule of necessity. But there is no foothold for such a theory. If Congress can declare or authorize a resort to martial law; in other words, if it can set aside the safeguards of the Constitution and substitute military power, or authorize it to be done, its doing so places the military act which it authorizes entirely beyond the reach of the courts, and there is no protection for him who is threatened with it, nor redress for him who suffers by it. It cannot be that the law of the land is so impotent.[7]

The same position was taken by Hurd, who maintained that the power to declare martial law was extraconstitutional and that it was not included in the war powers. His argument was:

While it is unquestionably true that where martial law exists, the privilege of the writ of habeas corpus is suspended, yet whether martial law shall prevail or not, does not depend upon the will of the President as Commander-in-Chief of the Army and Navy. Martial law comes with war, exists under proclamation or other act, and is limited by the necessities of war. It suspends the privilege of the writ of habeas corpus, not because some officer has issued a proclamation to that effect, but because it closes the courts, deprives civil officers of the power to serve process, and turns all civil government over to the hand of the military officer in command. It suspends, while it lasts, not only the privilege of the writ, but also the civil power of the legislative, judicial and executive branches of the government. To say, in such case, that the suspension is the act of the President, is to say that he abolishes courts, removes civil officers and destroys civil process. No provision of the Constitution was necessary to enable the suspension of the privilege of the writ, at such times, as the Constitution itself is suspended by martial law in the territory over which it extends. The constitutional provision was intended to apply in cases where martial law does not exist and where the civil law is able to exert its authority. The doctrine seems to be that the suspension of the privilege of the writ contemplated by the Constitution has no relation to a state of martial law, and can take effect only in those cases of rebellion or invasion where the power to issue and proceed under the writ is free and unobstructed.[8]

[7] *Ibid.*, pp. 559-560. See also "Use of Army in the Aid of Civil Powers," *Digest of Opinions of Judge Advocate General*, 1901, p. 786.

[8] Rollin C. Hurd, *A Treatise on the Right of Personal Liberty* . . . , 2d ed., p. 127.

These statements, while reviewed primarily to show the relation of martial law to the writ of habeas corpus, uphold the contention that martial law is extraconstitutional in nature. Ballantine believes that the idea of punitive martial law is an abdication of the supremacy of law.[9] Recently the statement has been made that "In the final analysis the justification for the existence of martial law is not to be sought in the Constitution for it is a régime not contemplated by the framers."[10]

The opposite viewpoint, that martial law is in harmony with the Constitution, has been taken in many court decisions and has been upheld by many writers. Wallace believes that the "declaration of a state of war and martial law by a state does not overthrow the constitution."[11] It has been held by many that the power to declare and enforce martial law is a war power, and, while not referred to in the Constitution, yet is implied and its use is constitutional. Henry J. Fletcher says that some people

> . . . think that to suspend during a period of martial law certain individual liberties is equivalent to suspending the whole constitution and handing the country over to a military dictator. But this involves a fundamental misconception. No one would seriously claim that the military authority should be placed above the constitution. In providing for the suspension of the privilege of habeas corpus the constitution does not decree its own abolition; and when it provides for the temporary suspension of the individual rights which the habeas corpus was designed to protect until the ship of state emerges from the danger zone, the constitution merely shifts the responsibility for safeguarding the interests of the state and its citizens from one set of officers to another.[12]

Ballantine states that "From a practical as well as a theoretical point of view, necessity never requires that the constitution be

[9] Henry W. Ballantine, "Military Dictatorship in California and West Virginia," *California Law Review*, I (July, 1913), 426.

[10] H. D. Linscott, "Martial Law and Executive Process," *George Washington Law Review*, I (Nov., 1932), 105.

[11] George S. Wallace, "The Need, the Propriety and the Basis of Martial Law, with a Review by the Authorities," *Journal of the American Institute of Criminal Law and Criminology*, VIII (Sept., 1917), 419.

[12] Henry J. Fletcher, "The Civilian and the War Power," *Minnesota Law Review*, II (Jan., 1918), 130.

suspended and set aside or that the citizens be subjected to arbitrary military orders."[13] A. J. Lobb, in the *Minnesota Law Review,* agrees that the declaration of martial law does not overthrow the constituted authority and the law.[14] George A. White has recently stated that "Martial law must be considered merely a part of civil law and, it may be said, the final assurance that our constitutional guaranties and civil law will continue in force and effect."[15] This opinion of the different writers has been substantiated by different court decisions[16] and is at the present the widely accepted view. When it is said that martial law overthrows the Constitution and the laws, and that its use is not provided for by them, the employment of martial law must mean that the Constitution is temporarily overthrown. The other viewpoint is that martial law is permissible under the war powers and the power to execute the law, and is in harmony with the Constitution itself.

It has already been shown that there are two kinds of martial law, punitive and preventive. Garrard Glenn in his book, *The Army and the Law,* states that

> So far as the preventive feature of martial law is concerned, however, no statute is necessary. If any doctrine can be said to be clearly settled in this country at the present day, it is that the State has the power to do two things. First, it may determine whether there is the necessity for declaring a state of martial law, and this determination is an act of state which cannot be judicially reviewed. This judgment having been formed, the State may put it in force by the use of preventive measures of the kinds already mentioned, protection of property and works, dissolution of mobs, and detention of persons; and all of this free from the direction of the civil authorities or review by the courts.[17]

[13] Henry W. Ballantine, "Unconstitutional Claims of Military Authority," *Yale Law Journal,* XXIV (Jan., 1915), 215.

[14] Albert J. Lobb, "Civil Authority versus Military," *Minnesota Law Review,* III (Jan., 1919), 106.

[15] George A. White, "Martial Law," *Oregon Law Review,* XIV (April, 1935), 402.

[16] As *Ex parte McDonald,* 49 Mont. 454 (1914).

[17] Garrard Glenn, *The Army and the Law,* p. 182.

Henry J. Hersey, writing upon the power of the governor during domestic disturbances, believes that

> military authorities are not required to turn such arrested persons over to the civil authorities during the continuance of the insurrection but can detain them until the insurrection in suppressed, when they should be turned over to the civil authorities to be tried for such offenses against the law as they may have committed. . . . Where the militia is engaged in suppressing an insurrection and has arrested a person for aiding and abetting such insurrection, his arrest *is legal, and his detention in the custody of the military authorities* until the insurrection is quieted *is also legal*, and the court will not interfere to release such person upon a writ of habeas corpus.[18]

The question remains whether an executive is limited to the use of qualified martial law or whether his powers include punitive martial law.

So-called martial law, except in occupied territory of an enemy, is merely the calling in of the aid of military forces by the executive, who is charged with the enforcement of the law, with or without special authorization by the legislature. Such declaration of martial law does not suspend the civil law, though it may interfere with the exercise of one's ordinary rights. The right to call out the military forces to maintain order and enforce the law is simply part of the police power. It is only justified when it reasonably appears necessary, and only justifies such acts as reasonably appear necessary to meet the exigency, including the arrest, or in extreme cases the killing of those who create the disorder or oppose the authorities.[19]

A stronger statement of this view is given by L. K. Underhill in the *California Law Review*. He concludes his article with the following paragraph:

> . . . it is difficult to see how trial of civilians in the home territory by military commission under "martial law," can, as a matter of fact, be justified. The military forces, like peace officers, may, to

[18] Henry J. Hersey, "Power and Authority of Governor and Militia in Domestic Disturbances," [American] *Law Notes*, XIX (May, 1915), 31.

[19] Charles K. Burdick, *The Law of the American Constitution*, p. 261.

accomplish their lawful errand, find it necessary to trespass upon property, to seize weapons, or to detain, or even to commit homicide upon an insurgent *in flagrante delicto;* they may have to go farther than peace officers may do, and refuse, for the time being, to obey the order of a court to vacate the property, to restore the weapons, or to free the prisoner; but it is difficult to see how they can justify, on the grounds of necessity, an unlawful trial and sentence of a prisoner already taken. If the prisoner is innocent, he is not deserving of punishment; and he is entitled to have his guilt or innocence determined in the forms prescribed by law. It is the function of the military forces to hold the prisoner until order is restored and he can be safely turned over to the civil authorities for trial. Martial law prevents, but it does not punish.[20]

Owen J. Roberts, long before he became a United States Supreme Court Justice, made some very interesting statements concerning the nature of martial law. He believed that except in time of actual war no exception should be made to the rule that civil law is higher than the military. And even in time of war the only reason for the use of military rule, he thought, should be that there is no machinery for the enforcement of civil law.[21] Charles Fairman holds that since insurrection and war are not synonymous, ". . . a governor may not exercise war powers during an insurrection."[22] He believes that the "decisions conceding punitive powers to the executive have marked a trend toward the side of authority which is not warranted by precedent nor socially expedient."[23]

Many writers, especially those connected with the army, have taken an opposite view. They maintain that martial law is punitive as well as preventive. Otherwise, it has been claimed that the use of martial law would in many cases prove to be inadequate and powerless. Glenn, in the final paragraph of his book, *The Army and the Law,* states:

[20] L. K. Underhill, "Jurisdiction of Military Tribunals in the United States over Civilians," *California Law Review,* XII (Jan., 1924), 178.

[21] Owen J. Roberts, "Some Observations on the Case of Private Wadsworth," *American Law Register,* XLII (Feb.-March, 1903), 161.

[22] Charles Fairman, "Martial Rule and the Suppression of Insurrection," *Illinois Law Review,* XXIII (April, 1929), 787-788.

[23] *Ibid.,* p. 788.

The question, in any such case, is simply whether the government is powerless, because of fancied limitations inherent in our Constitution, to take the necessary steps to protect the Constitution itself. It can hardly be doubted that, in any such case, the view of the minority in the Milligan case, will prevail. Opposition to that view rests on superstition rather than sound tradition; and superstition is not a part of the common law whose very life is historical truth.[24]

Frazer Arnold, writing in the *American Bar Association Journal*, maintains a similar position:

> The troops enter a district where no actual civil guaranty or protection exists for the purpose of revivifying the civil regime as soon as possible and of then withdrawing; they do not enter the district to carry on or administer the civil functions of constitutional government, but merely, and as promptly as possible, to clear the way for the civil officers of the Constitution to resume those functions. . . .
> . . . the executive's authority is paramount; and the civil courts have no right to impede him and his officers, in their constitutional military mission, by writs of habeas corpus and the like.[25]

Birkhimer is the champion of military tribunals and punitive measures. He thinks that, "as martial law brings unusual offences, it authorizes also tribunals suited to their adjudication." The justification for these tribunals is "based on no more reason than similar questions would be regarding common-law courts, because the latter are not found on positive provisions of the law."[26]

It is evident that the question whether or not punitive martial law may be exercised in the United States is still an open one. The viewpoint of the opinion in the *Ex parte McDonald* case has been popular, but it must be remembered that this

[24] Glenn, *op. cit.*, p. 190.

[25] Frazer Arnold, "The Rationale of Martial Law," *American Bar Association Journal*, XV (Sept., 1929), 552-553. Arnold's arguments were later answered in a letter to the editor of the *American Bar Association Journal*. Among other things the writer stated that Mr. Arnold's position was "opposed to the weight of authority, subversive of the United States Constitution" (letter of Lowndes Maury, *American Bar Association Journal*, XV, Nov., 1920, 721).

[26] Birkhimer, *op. cit.*, p. 418.

doctrine applies only to the different states and not to the United States. The one point upon which all agree is that punitive martial law should be used only as a last resort.

It has been shown that the fact that the civil courts are open has precluded the use of martial law. This doctrine may be traced from early English history, through the *Wolf Tone Case,*[27] its transfer to America, and its adoption as law in the *Ex parte Milligan* decision. Since that opinion was given, commentators upon the law have developed a contrary view—a viewpoint that has had great effect upon the courts. It has been claimed that this doctrine has become of no value for two reasons: first, new developments in the mode of fighting make it possible for the civil courts to be open and yet be in the actual fighting zone, and second, the real criterion is not whether the courts are open but whether they are functioning properly. Martial law is the law of necessity; but, according to Gerald F. Flood, "the mere breach, or persistent breach of a single law does not create the necessity. The defiance of law in the district must be general, and of such a nature as to close the courts or paralyze the administration of the law."[28]

The view that martial law cannot be used if the civil courts are open has been losing ground since the Civil War. Sutherland, in his *Notes on the Constitution,*[29] says that martial law can be used only when the courts are closed, and some still hold to this view,[30] but many others have discarded it. Dr. Francis Lieber, in a manuscript found after his death, stated that "It has been denied that the government has any right to proclaim martial law, or to act according to its principles in districts distant from the field of action, or to declare it in larger districts than either cities or counties. This is fallacious. The only justification of martial law is the danger to which the country is

[27] 27 *State Trials* 613 [English] (1798).

[28] Gerald F. Flood, "Martial Law and its Effect upon the Soldier's Liability to the Civilian," *University of Pennsylvania Law Review and American Law Register,* LXXIII (May, 1925), 401.

[29] Sutherland, *Notes on the Constitution of the United States,* p. 224.

[30] S. E. Baldwin (*The American Judiciary,* p. 299) says: "Ordinarily no military officer can rightfully enforce martial law in a place where the regular courts . . . are open and in the proper and unobstructed exercise of their jurisdiction."

exposed, and as far as the positive danger extends, so far extends its justification."[31] Dr. Lieber based the justification of martial law upon necessity and did not even consider the question of whether the courts were open as being important.

In his *American Constitutional Law* Hare contends that

> In saying that martial law cannot arise from a threatened invasion, Mr. Justice Davis may have gone too far, and unduly limited the right of the military authorities to provide for the safety of the community. Nothing short of a necessity can justify a recourse to martial law; but such a necessity may exist before the blow actually falls. . . . All that can be said with certainty is that there must be reasonable and probable cause for believing in the imminency of a peril that suspends the ordinary rules. . . .[32]

Willoughby states that

> There would seem to be but little question that the doctrine stated by the majority in the Milligan case is essentially a sound one, namely, that actual necessity and not constructive necessity as determined by legislative declaration, alone will furnish justification for substituting martial for civil methods. It would seem, however, that in one respect the opinion is open to criticism. . . . It is correct to say that "the necessity must be actual and present," but it is not correct to say that this necessity cannot be present except when the courts are closed and deposed from civil administration, for, as the minority justices correctly pointed out, there may be urgent necessity for martial rule even when the courts are open. The better doctrine, then, is, not for the court to attempt to determine in advance with respect to any one element, what does, and what does not create a necessity for martial law, but, as in all other cases of the exercise of official authority, to test the legality of an act by its special circumstances. Certainly the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, but it should not furnish an irrebuttable presumption.[33]

[31] Lieber, *loc. cit.*, p. 558.

[32] Hare, *American Constitutional Law*, II, 964-965.

[33] Westel W. Willoughby, *The Constitutional Law of the United States* (2d ed.), III, 1602. See also statement of Charles Warren, *op. cit.*, pp. 201-202.

The articles upon this subject in the law journals seem to support this viewpoint and give further proof that this particular part of the Milligan decision has been repudiated by the authorities upon martial law today. H. J. Fletcher, in an article that appeared in the *Minnesota Law Review,* gives his opinion as follows:

> To the timid who, in order to justify martial law, require that it be exercised only in "the actual theater of war," it should be sufficient to answer that that phrase embraces every place in which any military activities are going forward.

He therefore apparently believes that the term "theater of war" should really cover the whole territory of a belligerent power whenever war is declared and that any power limiting the use of martial law will be disastrous. He continues by saying:

> If it be the true meaning of the constitution that the war power has been fettered by provisas which put the liberty of the citizen above the safety of the state, then either the experiment of self-government will prove a failure, or the chosen leader of the people must when necessary disregard mere paper barriers. Unquestionably the war-leaders will use every weapon within reach, and it would be wiser to adopt that interpretation of the fundamental law which legalizes whatever imperative necessity compels, than to endeavor to put bounds to that which is essentially absolute and unlimited.[34]

Whatever the limits the above writers place upon the use of martial law, they agree on one point—that martial law should not invariably be prohibited because of the fact that the civil courts are open. Some of these writers contend that necessity is the only limit for martial law and that the commanding officer is to judge this necessity. Such a doctrine would appear to be too radical. The true limit of martial law with respect to civil courts would seem to be that when the civil courts are handling the situation successfully and are functioning properly, martial law should never be instituted. This conclusion would tend to harmonize the different viewpoints,

[34] Fletcher, *loc. cit.,* p. 131.

since martial law is never necessary if the civil courts function properly and successfully and if the term "open court" is taken to mean a properly functioning court. Truly this is not an unreasonable contention.

The position of the President of the United States with respect to martial law has been studied in connection with the use of martial law during the Civil War. Since that date further opinion has been given by different writers upon the point, and especially with relation to the writ of habeas corpus and other constitutional provisions respecting individual rights.

Pomeroy, in his *Constitutional Law,* ascribes to the President not only the power to proclaim martial law, but also the power to proclaim punitive martial law and to carry it into force. His opinion is as follows:

> It may be conceded that the President has no authority to declare or proclaim martial law, and make it general in a district where the courts are open and unobstructed; Congress certainly has none. But the President, as Commander-in-Chief, wages war; the sole object of his hostile endeavors is success. In respect to some of his operations he is certainly untrammelled by the restraining clauses of the Bill of Rights. . . . Whenever a civilian citizen or alien, is engaged in practices which directly interfere with waging war, which directly affect military movements and operations, and thus directly tend to hinder or destroy their successful result, and when, therefore, these practices are something more than mere seditious or traitorous designs or attempts against the existing civil government, the President as Commander-in-Chief may treat this person as an enemy, and cause him to be arrested, tried and punished in a military manner, although the civil courts are open, and although his offense may be sedition or treason, or perhaps may not be recognized as a crime by the civil code.[35]

Hare agrees with this viewpoint:

> It is much more nearly an authority, command, or power derived from the function of the President as commander-in-chief, and to be exercised according to a sound discretion, which, though not clothed with legal forms, is yet subordinate to the law, and account-

[35] John N. Pomeroy, *Introduction to the Constitutional Law of the United States,* ed. Edmund H. Bennett, pp. 597-598.

able to it for any needless invasion of personal liberty or private right. To refer such an authority to the legislature or require their sanction for its exercise, is therefore to limit it where it requires scope, and enlarge it where it requires limitation.[36]

If the President has the power of declaring martial law, he must of necessity have the power of suspending the writ of habeas corpus. Although Birkhimer claims that "It may be assumed without greatly erring that the power to suspend the privilege of the writ of *habeas corpus* and the power to declare martial law are not widely different,"[37] they are distinct from one another. Martial law is much the broader term and may include the suspension of the writ. The suspension of the privilege of the writ of habeas corpus falls short of the establishment of martial law. Sutherland, speaking of the habeas corpus clause of the Constitution, says: "A distinction is to be drawn between the suspension of the writ under this clause and the *ipso facto* suspension which takes place when martial law actually exists."[38] Willoughby thinks that "In time of war, or of domestic insurrection or disorder, when so-called martial law has been declared, the privilege of the writ of habeas corpus, together with all the other civil guarantees may, for the time being, be suspended."[39] T. F. Carroll, in an article on the use of the writ during the Civil War, concludes that martial law may be declared by the President when necessary in the actual theater of war and that "the President had authority temporarily to suspend the writ of habeas corpus in the vicinity of the theater of war." If the President exceeded his power, then his act may be made valid with an act of Congress.[40] In conclusion, it is not difficult to agree with Black, who says that "The privilege of the writ is not usually suspended except when martial law has been declared in a particular place or district."[41] It is the consensus of opinion, therefore, that the President through his war power may institute martial law

[36] Hare, *op cit.*, II, 968.
[37] Birkhimer, *op cit.*, p. 398.
[38] Sutherland, *op cit.*, p. 224.
[39] Willoughby, *op. cit.*, III, 1612-1613.
[40] Thomas F. Carroll, "Freedom of Speech and of the Press during the Civil War," *Virginia Law Review*, IX (May, 1923), 550.
[41] Henry C. Black, *Handbook of American Constitutional Law* (2d ed.), p. 600.

and as a necessary adjunct to this power may suspend the privilege of the writ of habeas corpus. This is a reasonable conclusion in harmony with the Constitution.

For a long time the accepted rule has been that the actions of the President, taken in furtherance of his declaration of martial law, are not reviewable by the courts if they are considered necessary. A President, or the person in authority subordinate to the President, or the governor of a state, can do anything under martial law so long as the actions are necessary to accomplish the end in view. He cannot be punished except by impeachment. This position is defended by several writers upon martial law. G. S. Wallace believes that

> The Constitution imposes upon the President the duty of putting down insurrection, rebellion, invasion, etc. It does not say how it must be done. Upon what theory could we look to the acts of the legislative department to see how we should perform this duty? Upon principle we should not. . . .
>
> Upon what theory should the executive answer to the judiciary as to the necessity of his acts? . . .
>
> The extent of the use of these measures rests with the department that puts them in force, and it is not for the branch of government that has demonstrated its inability to control the situation to handicap another branch that is charged with the duty of restoring law and order. This construction of the Constitution harmonizes all of its provisions, and is consonant with the canons of construction.[42]

Hare says:

> All that can be said with certainty is that there must be reasonable and probable cause for believing in the imminency of a peril that suspends the ordinary rules, which must be determined at the time by the commander, but may be reconsidered subsequently by a court and jury, who will rarely look unfavorably on any man who at a critical period has acted in good faith for the protection of the community.[43]

Notwithstanding the above statements the rule of good faith has not been accepted by many writers upon martial law, al-

[42] George S. Wallace, *op. cit.*, pp. 418-419. [43] Hare, *op. cit.*, II, 965.

though it was adopted by the Supreme Court in *Moyer* v. *Peabody*.[44]

The effect of *Sterling* v. *Constantin* was to enlarge the courts' power to review the action of the executive when he had declared martial law. Not only must the executive act in good faith, but a governor must use his power only when necessity actually exists. It is true that the state executive may call out the military when he thinks necessary, but the federal judiciary will go over the facts to decide whether the necessity justified the military measure that was undertaken. Elmer E. Smead states:

> Where it appears that there is an actual state of violence, the Governor has a free hand under the Fourteenth Amendment, so long as his orders and the conduct of the military in the field are preventive and not punitive. But where it is evident that there is no actual violence, the Governor's acts and those of his military subordinates are subject to judicial limitation under the Fourteenth Amendment although not as to his declaration calling the troops into service.[45]

Professor Fairman calls attention to the fact that the Supreme Court in *Sterling* v. *Constantin* did not follow the lower court limiting the powers that may be exercised by a military commander in time of insurrection to those of a police officer. He points out the fact that the Chief Justice "speaks of a range of honest judgment, measured by the test of direct relation to subduing the insurrection."[46] The federal judiciary then passes upon the necessity of executive actions when martial law is

[44] 212 U. S. 78 (1909). The state constitutions as a whole make very few references to martial law. Rhode Island Constitution says that martial law shall be used and exercised only when necessity requires. Art. 1, Sec. 18, Massachusetts, Maryland, Maine, New Hampshire, South Carolina, Tennessee, Vermont, and West Virginia constitutions say that only the persons in the army and navy or in the militia can be subject to martial law. In three, Massachusetts, New Hampshire, and South Carolina, other provisions state that any person can be subject to martial law by authority of the legislature. The constitution of Tennessee alone holds that the use of martial law is inconsistent with free government.

[45] Elmer E. Smead, "Martial Law in the Oil Fields of Oklahoma and Texas," *Oklahoma State Bar Journal*, VI (April, 1935), 14.

[46] Charles Fairman, "Martial Law in the Light of Sterling v. Constantin," *Cornell Law Quarterly*, XIX (Dec., 1933), 32-33.

declared, and while limiting the freedom of the executive, protects rights of the individual. "The Federal Constitution may be a bulwark to the citizen against a state executive's assumption of arbitrary powers, . . . for, whether he acts within the scope of his authority under such proclamation is always a question for judicial review."[47]

Professor Corwin, however, believes that the proper check upon the President's power to declare martial law is Congress, for

> The basis of martial law is always the necessity of the case, whether or not the President is entitled to determine the existence of such necessity in a way to bind the courts. But whenever necessity is the basis of national power then the final say rests with Congress by virtue of its powers under the "necessary and proper" clause; and an act of Congress, whether for the purpose of defining beforehand the occasions warranting a declaration of martial law, or for the purpose of terminating or qualifying a current exercise of it, would be binding on the President by virtue of the very duty which he ostensibly discharges when he resorts to martial law—the duty "to take care that the laws be faithfully executed." Nor has the President any prerogative as Commander-in-Chief to employ martial law against domestic disorder except in the performance of this duty, in other words, as an instrumentality of law enforcement. Nor would a Presidential "declaration of war" survive a counter declaration by the war-declaring power.[48]

Looking toward the future development of martial law, many writers exhibit great concern over its use during economic emergencies and also during economic disputes. Both of these problems are of great concern. To ascertain what the future has in store is indeed a difficult undertaking. At present there is a strong feeling against the use of martial law during an economic emergency. Certainly the *Constantin* case implies that there is a great difference between an economic emergency and a war emergency. One writer in speaking of the use of

[47] "Constitutional Law—Federal Constitutional Limitation on Military Powers of State Governor," *Virginia Law Review*, XXII (May, 1936), 825-826.

[48] Edward S. Corwin, "Martial Law, Yesterday and Today," *Political Science Quarterly*, XLVII (March, 1932), 102-103.

the militia during economic distress says: "Of course, the truth of the matter is that the militia was used, not to suppress insurrection, repel invasion or avert public danger, but in an attempt to aid the economic welfare of the state and its citizens. Is such a use permissible? . . . That answer must be emphatically no."[49] It would appear, therefore, that in the future, when economic distress develops, the executive either must use other means to cope with the problem or must use martial law for the duration of the emergency and evade court action as long as possible—the American compromise between the danger of arbitrary rule and the necessity for direct action.

Organized labor has for many years vigorously opposed the use of martial law during industrial disputes, claiming that the troops help make strikes ineffective. Labor also maintains that the militia usually sides with capital. There has been enough evidence to justify this attitude which has been prevalent in all the mining and industrial states. The methods that labor has available for preventing the use of martial law and limiting the evils are: first, to persuade the executive not to resort to it; second, to bring court action against the men who carry martial law into effect; and, third, by the use of the writ of habeas corpus, to free the prisoners of the military. The first method depends largely upon the personality of the executive. Labor has used it to considerable advantage.[50] The second method has not met with any great success. Recently, several attorneys have written a brief concerning the use of the courts as a way for organized labor to prevent the use of martial law in industrial disputes. It reads as follows:

Since it is clear that the declaration of martial law cannot be attacked, habeas corpus is normally the best remedy for challenging the acts of the militia. In the Constantin case in Texas the injunction was aimed at all the acts of the Governor and militia interfering

[49] Garrett Logan, "The Use of Martial Law to Regulate the Economic Welfare of the State and its Citizens: A Recent Instance," *Iowa Law Review*, XVII (Nov., 1931), 48.

[50] At the present time (July, 1938) President Roosevelt has refused to take any part in the present industrial disputes, although violence has taken place and lives have been lost.

with the plaintiff's production of oil. No such situation is often presented in a strike. A court would be most reluctant to enjoin the military from making future arrests of strikers or detaining them, while it might hold illegal the present detention of particular strikers under the circumstances shown at the time to exist. . . .

The decisions in both state and federal courts have by no means foreclosed attacks upon the conduct of military authorities. If the Supreme Court of the United States is prepared to consider deprivations of liberties of strikers upon the same basis as it has considered deprivations of property by the troops in the Texas oil case, the lawful range of military activity can be greatly narrowed.

However, the treatment of liberties of workers in the past by the Supreme Court, does not offer much hope for effective relief. In any event American labor history makes it increasingly apparent that labor's victories are to be won in the shops and fields, not in the courts.[51]

The use of martial law in industrial disputes will continue to be a very serious problem, particularly since labor unrest has increased. On one side the problem is further complicated by the fact that martial law frequently has been a judicial instrument of oppression of labor, similar to injunctions against strikes. On the other side the recent uses of martial law indicate that it may be used to close plants during industrial disputes and to foster the growth of organized labor. Martial law is thus a possible weapon for either capital or labor.[52] Charles Fairman believes that there is no single remedy to effect the cure except, of course, industrial peace. He suggests that by having better trained militia and by careful study of the rules of martial law, desirable progress may be made.[53]

Only one general conclusion can be reached from these different opinions. It is that there is a great divergence of views upon martial law among different writers. Most of them agree, however, that martial law is the law of necessity, the

[51] International Juridical Association, *Martial Law in Strikes,* pp. 14-15.

[52] W. Merrill Whitman, "Martial Law—Federal Courts—Injunction—Materiality of Motive for Declaration of Martial Law," *Nebraska Law Bulletin,* XIII (Feb., 1935), 303-304.

[53] Charles Fairman, "Martial Rule and the Suppression of Insurrection," *Illinois Law Review,* XXIII (April, 1929), 788.

necessity to be determined by the persons in authority, and that it is certainly preventive and possibly punitive. It suspends the privilege of the writ of habeas corpus, and may be instituted by the President or the governors of the different states, or the subordinates of these two officers acting by their authorization. Among writers the question of its relation to the Constitution is still unsettled, although it appears that the use of martial law is not extraconstitutional but is one of the enumerated and implied powers.[54]

SUMMARY

Martial law, unlike civil law, is not statutory in nature. It is the will of the commander, subject to a few regulations. It is used only when necessary and is the law for emergencies. Martial law, in the United States, may be employed in time of war in the actual theater of the war, and in time of peace when the civil courts are closed or when they are unable to function in the proper manner. Martial law is based upon necessity. It is a measure that is not usually used until less drastic measures have failed. It is never a cure but acts as a police power in preserving order, and at the same time it is the means of restoring the provisions of the Constitution which, for the time being, have been suspended in the trouble-zone. Because of the ever present danger that martial law might degenerate into the uncontrolled will of the commander, its use has been looked upon with disfavor by many. This is indeed a serious obstacle. The importance of the position

[54] The following conclusions were reached by the English writer, Tovey, and although they are very general, yet they state the conditions of the use of martial law very clearly.

". . . Marshal law is the rule substituted for ordinary law when the jurisdiction of the latter is suspended.

"It prevails only during times of disturbance when the ordinary law is suspended and may be applied both to civilians and to soldiers.

"Marshal law is, no doubt, a great evil where it can be avoided, and only justifiable by absolute necessity, but the history of the past tells us that the summary power conferred by it is occasionally essential for the safety of the community at large, and the only means of averting wholesale outrage and rapine.

"The greatest care should be taken to limit the jurisdiction of Marshal Law to the narrowest bounds practicable to attain the required end, and every means should be taken by those in command to prevent the extraordinary powers exercised degenerating into brutality" (Tovey, *Marshal Law*, pp. 65, 68, 70).

of the person who institutes martial law must not be minimized, for the successful use of martial law depends to a great extent upon him.

In an attempt to clear up the confusion regarding martial law, Chief Justice Chase says in the dissenting opinion of *Ex parte Milligan* that there are three kinds of military jurisdiction: military law, military government, and martial law. There is little danger of confusing military law with martial law, for their chief similarity is only in name. Military government, on the other hand, is a form of government established over conquered territory superseding local law and as such it is easily recognized. "It is the duty of the President so long as war continues to provide for the security of persons and property in territory taken from the enemy's control, and to this end he may institute a temporary military government, which will continue to be a valid government until the ratification of a treaty of peace and the provision by Congress for the formation of another government."[55] Berdahl states that military government may be distinguished from martial law, for "the former is exercised only in time of war over the inhabitants of an occupied enemy country; while the latter may be instituted during an emergency, whether in time of war or peace, over the citizens at home."[56] It is around martial law itself that the confusion has rested and remained down through the years.

Martial law, in the broad sense of the term, may be used in time of war and in time of peace. In time of war there may be two kinds of martial law: martial law over enemies and martial law over the civilians who may reside in the war zone. There is no doubt about the right of the United States to use martial law with respect to enemies. It is an outgrowth of the war power and its use is made possible by the declaration of war. Military government occurs usually after the conquest, but during the actual fighting and until military govern-

[55] *The Constitution* (annotated), p. 376, *Senate Documents*, 67th Cong., 2d Sess., Vol. 3.

[56] Clarence A. Berdahl, *War Powers of the Executive in the United States*, p. 152.

ment is established, martial law over the enemies of the United States is a logical outgrowth of the war powers contained in the Constitution.

Martial law may be established over civilians, in time of war, in the trouble-zone. An illustration of this mode of martial law occurred at New Orleans during the War of 1812. At that particular time New Orleans was threatened by the British, and General Jackson considered that he had both the privilege and the power of proclaiming martial law and enforcing it over the citizens of the United States. He did this as a necessary incident to his power as commanding general. It did not mean that the whole Constitution was suspended, but only those provisions that would interfere with the winning of the war and the preservation of the Constitution itself. It extended to these provisions alone, "but no farther."[57] Although the use of martial law of this type has occurred very rarely in the history of the United States, it is undoubtedly true that martial law may be established over civilians in the actual theater of war.[58]

Martial law may be established in peace time over civilians residing in the United States. By "peace time" is meant a state of affairs when there is no open enmity against the government of the United States. Violence brought about by industrial disputes is not war, although martial law may be used, and its use be necessary and constitutionally upheld. It has been shown that martial law over civilians may be either punitive or preventive—punitive in time of insurrection when the courts are closed or are not functioning properly, and preventive when the courts are unobstructed and yet need aid in the execution of the law.

Military troops are sometimes used as an aid to the civil authorities when martial law is not declared. The troops then act a role similar to deputy sheriffs, and do nothing on their own responsibility; they act directly under the civil power.

[57] See the defense of Jackson at his trial for contempt of court, *Niles' Weekly Register*, VIII, 250.

[58] *Ex parte Milligan*, 4 Wall. 2 (1866).

This use of troops is distinguishable from the use of troops under martial law, because there is no declaration of martial law and the troops act in entire subordination to the civil authorities.

The establishment of state police forces, which has taken place rapidly during the last few years, will afford strong support to local police officers. Possibly the state police will in the future bolster local officers to such a degree that the militia will seldom be called out. The militia was not used during the Johnstown trouble of 1937 because Governor Earle deemed the state police adequate to control the situation. While it is too soon to generalize, it is entirely possible that within the next few years a judicious use of the state police will make resort to the calling out of the militia and the declaration of martial law unnecessary.

Martial law therefore may exist both in time of peace and in time of war. In time of war it may extend over enemies and civilians in the war zone. In time of peace it may be declared in time of insurrection, or revolt, or industrial disturbances when a degree of actual war has not been reached and where there is no actual enmity against the United States government. This use of martial law may be either punitive or preventive, depending upon the type of disturbance. Such is a brief account of the nature and extent of the different varieties of martial law.

Martial law, as defined by the different commentators, must be either unconstitutional, extraconstitutional, or constitutional. That the use of martial law may be unconstitutional is not doubted. This was shown in the *Milligan* case, but this same case made clear that its use under certain conditions was constitutional. The conception of martial law as suspending the whole Constitution has strong advocates among the different writers.[59] This viewpoint seems neither correct nor necessary. Martial law can be harmonized with the Constitution, for its use is implied by constitutional provisions. Is martial law extraconstitutional when exercised in time of war? It would

[59] See above, p. 175, for Hurd's opinion.

appear that when used over the enemy in time of war, its use is in perfect harmony with the Constitution. It is an outgrowth of the war power. Moreover, when martial law is exercised over civilians in time of war, usually the Constitution has already been suspended by the war, and it is not martial law that suspends the Constitution but the war itself. Of course, as the incident at New Orleans proved, martial law may be used over civilians while the Constitution, although threatened, is yet in force. Only in such instances can it be said that martial law is suspensory in nature; even then it does not suspend the whole Constitution, but only those special provisions that conflict with the winning of the war. Only in this limited sense may it be considered as suspensory, and even then it is more sustentative than suspensory.

When martial law is used in time of peace, it should be used only when the civil authorities are ineffective and when law and order have been overthrown by insurrection, rebellion, or class warfare. Then the Constitution has been overthrown, either partly or in whole, by the rebellion itself, and martial law is used only to restore law and order and to preserve the Constitution. In short, martial law would seem to be restorative in nature rather than suspensory and, as such, is not extra-constitutional in nature, but is a measure undoubtedly contemplated by the Constitution itself.

It is therefore necessary to conclude that martial law is a constitutional measure. The power to declare martial law rests upon two separate constitutional powers. It is a necessary adjunct of the war powers, and it is implied when the President is authorized to "take care that the laws be faithfully executed."[60] The confusion that is relative to martial law rests, to a large extent, in the uncertainty concerning the relation of martial law to certain constitutional provisions.

Martial law, as a necessary outgrowth of the war power, is implied in the Constitution when the powers of Congress are enumerated. Congress is given the power of declaring war, of raising armies, etc., with the added power that is contained

[60] Article II, Sec. III, *Constitution of the United States.*

in the necessary and proper clause. The war powers of Congress are very extensive in nature. Congress has the power to raise and support armies, to make appropriations of money and to call out the militia, to suppress insurrections, and to repel invasions. Therefore, no matter how troops are used under martial law, Congress is bound to have a great amount of power over their use. The actual war power resides in Congress. The power of the President is executionary in nature. His position of Commander-in-Chief is guaranteed by the Constitution and cannot be interfered with by Congress, but as far as the actual "war powers" are concerned, he is bound by Congress. At this point it may be said that Congress may delegate certain powers to the President, and these delegated powers have given rise to some uncertainty concerning the war power of the President. These powers, while given to the President, may be taken away from him at any time by Congress. The following power has often been incorrectly called a constitutional war power of the President. The Constitution stipulates that Congress shall have power to "suppress insurrections and repel invasions."[61] However, by the Acts of Congress of February 28, 1795, and of March 3, 1807, the President was authorized to call out the forces of the United States and to repel invasion or to suppress insurrection against a state or the United States.[62] In this manner discretionary war powers were placed upon the President. Burdick says, "It is, therefore, clear that the ultimate control of the military machine is in the legislative rather than the executive branch of the government."[63]

The power of the President during war time centers around his position as Commander-in-Chief. The Constitution says that "the President shall be Commander-in-Chief of the Army and the Navy of the United States, and of the militia of the

[61] Art. 1, Sec. 8.

[62] Berdahl thinks that these acts were unnecessary, for he states that "The Power of the President to wage a defensive war without a formal declaration and without specific authorization by Congress is thus, according to all authority, clearly granted, if not in so many words, at least by implication and the inherent purpose of the Constitution" (Berdahl, *op. cit.*, p. 62).

[63] Charles K. Burdick, *The Law of the American Constitution*, p. 261.

several states when called into actual service of the United States."[64] This provision gives the President the power, according to Berdahl, of deciding "when and where troops shall be employed in time of war, so he alone likewise determines how the forces shall be used, for what purpose, the manner and extent of their participation in campaigns, and the time of their withdrawal."[65] But "the power of the President as Commander-in-Chief must be exercised in accordance with the laws and usages of nations, and in the manner prescribed by Congress."[66] The position carries great power; the Supreme Court has even decided that the President may declare war, although Congress may later pass upon his action, and may disallow it.[67] The President has been given the power to repel invasions and suppress insurrections. He also decides when troops shall be sent into a state in order to maintain a republican form of government. It was stated in *Martin* v. *Mott* that the judges were "all of opinion, that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union."[68] From the statement of the nature of these different war powers it may be concluded that martial law was both implied and contemplated by the Constitution. Certainly there is more ground for this implication than for others which have been made.

Martial law may be used by the President without recourse to his war powers. The Constitution states that the President "shall take care that the laws be faithfully executed."[69] It has been said, "This duty of the President is not limited to the enforcement of acts of Congress or of statutes of the United

[64] Art. 2, Sec. 2.
[65] Berdahl, *op. cit.*, p. 122.
[66] *The Constitution* (annotated), p. 374.
[67] *The Prize Cases*, 2 Black, 635 (1863).
[68] *Martin* v. *Mott*, 12 Wheat. 19 (1827), 30.
[69] Art. 2, Sec. 3.

States according to their expressed terms, but includes the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution."[70] During civil disputes, martial law is used as a means to secure the proper execution of the law. If punitive martial law has been resorted to, then the civil law has already been overthrown, while, if preventive martial law is used, the purpose is to secure the execution of the law which has been threatened and to see that the law-enforcing body functions properly. Instead of being prohibited by the Constitution, martial law is sanctioned by this provision. In the case of *In re Neagle,* which arose from the homicide committed by a federal officer in defense of a United States judge, the Supreme Court held that through this clause of the Constitution the President had the power to take measures to protect the life of a judge, even though the measures might result in the death of certain individuals.[71] Upon the same ground martial law is made justifiable because it is a necessary measure. To say that martial law is not permissible under the Constitution is to limit the power of the President to such an extent that he might be held liable to impeachment for neglect of duty. Therefore, it may undoubtedly be concluded that martial law is a constitutional measure.

It is evident from the above discussion of the constitutional provisions that relate to martial law, that the duty of declaring martial law and of putting it into force is placed in the hands of the President. It is possible for Congress to declare martial law but hardly possible that such action will ever be taken. In the states the duty of seeing that state law is faithfully executed is placed upon the different governors, who have the power of declaring martial law. The executive branch of the government, both in the United States and in the different states, is given the power over martial law. Also the executive branch of the government decides when the declaration shall take place—truly a great discretionary power.

[70] *The Constitution* (annotated), *op. cit.*, p. 391.

[71] *In re Neagle,* 135 U. S. 1 (1890).

The question now arises whether there are any restrictions placed upon the President and his subordinates or the state governors in the declaration and use of martial law. The limitation placed directly upon the person in authority is that he must act in good faith. For a long time it was thought, as martial law was the rule of necessity, its use could be constitutional only when it was absolutely necessary, and it was the judicial branch of the government who decided upon the necessity. This doctrine was altered for a time, and, while martial law was still the law of necessity, the person who instituted martial law was held to be free from interference by the courts so long as he acted in good faith. In the case of *Moyer* v. *Peabody* Justice Holmes said that so long as the arrests were made in good faith, the governor was the final judge and that he could not be held to answer by the courts when there was reasonable ground for his belief.[72] In the West Virginia case of *Hatfield* v. *Graham* there was an even stronger statement of the above opinion.[73]

However, the Supreme Court of the United States in *Sterling* v. *Constantin*[74] reversed this position by concluding that there were limits of military discretion and whether they had been overstepped in a particular case was for the judiciary to decide. The executive who declares martial law must do so only when war, riot, or insurrection are imminent, and instances when he acts in an arbitrary manner will be set aside by the courts. In a border-line case it is probable that executive determination of the existence of a proper emergency will be respected. It is evident, therefore, that when the person in authority acts in a proper manner, he will not be subjected to judicial review, yet the civil courts judge whether he acts properly. If he has not acted in good faith and at a proper time, his measures may be disallowed by the court, and he becomes liable also to impeachment.

Other restrictions are placed upon the use of martial law that bind the person in authority. In time of war martial law

[72] *Moyer* v. *Peabody*, 212 U. S. 78 (1909).
[73] *Hatfield* v. *Graham*, 73 W. Va. 759 (1914).
[74] *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

cannot be used outside the war zone; in time of peace it cannot be used when the courts are in operation.[75] The *Milligan* case said that martial law was impossible when the civil courts were open and in the proper and unobstructed exercise of their jurisdiction. This statement is still good law. It has been maintained many times that the doctrine of the *Milligan* case is that when the civil courts are open, martial law can never be used. This is an erroneous conclusion, for the Milligan decision held that the courts should not only be open but should be functioning properly. This statement has never been overruled and remains the true test for the use of martial law. It is not contrary to the rule stated in the *Milligan* case to institute martial law while the civil courts are open if they are not functioning. The fact that the courts are open has great weight, but the real test is the manner in which the civil courts exercise their jurisdiction. It may be concluded, therefore, that punitive martial law is impossible when the civil courts are open and in the proper exercise of their jurisdiction.

The question immediately arises as to who decides when the courts are unable to perform their duties. The answer is that this duty is placed in the hands of the President and the governors of the states and that, so long as there is a real need for the use of martial law, the courts will not interfere. If the executive should act in an arbitrary manner, the courts may disallow his action.

All grants of power in the Constitution are made with the understanding that they are not to interfere with constitutional guaranties placed in other sections of the Constitution. In each instance of the use of martial law there arises the difficulty of reconciling martial law with individual rights. The Fifth Amendment states that no person shall be deprived of life, liberty, or property without due process of law, and the Sixth Amendment guarantees a trial by jury. Does the use of martial law conflict with due process of law? Before this question can be answered it is necessary to understand what is meant

[75] This statement does not include preventive martial law.

by "due process of law." In the case of *Hurtardo* v. *California*[76] the Court said that due process of law was not a particular mode of procedure, and that a person, convicted of a crime without an indictment by a grand jury, had received due process of law. It was held in *Ex parte Wall*[77] that due process of law did not in all cases require a trial by jury. Therefore due process of law is a very flexible term and permits various modes of procedure.

Martial law is not contrary to due process of law for various reasons. In the first place, punitive martial law may be used in time of war and in time of insurrection when the civil courts are closed. In both cases the Constitution has already been suspended, and constitutional guarantees are not in force until martial law has restored the Constitution and the law. In such cases it cannot possibly be contrary to due process of law. Yet, whenever a person who has been active in overthrowing the Constitution is arrested and tried by martial law, he always pleads that it is contrary to due process of law, a guarantee which he has helped destroy.

Granting, however, that a person who is tried by a military commission is entitled to due process of law, there is still no conflict between martial law and due process of law. In the case of *Fong Yue Ting* v. *United States* the Court stated that the United States was a sovereign nation and as such had certain duties placed upon it. Having these specific duties, the United States was vested with "all the powers of government necessary to maintain that control and make it effective."[78] It was held in that case that the national government had the control of foreign relations, and the deportation of aliens was an incident of the use of that power and was not contrary to due process of law. This was not punishment for a crime but the exercise of a sovereign power.

It has been shown that in time of emergencies the United States Government has had power to do things that would not

[76] *Hurtardo* v. *California*, 110 U. S. 516 (1884).
[77] *Ex parte Wall*, 107 U. S. 265 (1883).
[78] *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893).

be permitted under ordinary conditions. A government must preserve its own existence. When that existence is threatened the government may resort to extraordinary measures. During the World War the Supreme Court of the United States upheld as emergency measures not only Congress' regulation of the rent charged by landlords in Washington, but also a law of New York State called the "Emergency Housing Act" that forbade, during the time of the emergency, the ousting of tenants by landlords while paying a "reasonable" rent.[79]

While the depression was in progress, justification for the enactment of certain legislation was based upon its emergency character. This ground of defense was considered by the Supreme Court. The Minnesota Mortgage Moratorium Act, which was an emergency measure for the relief of property owners in Minnesota, was upheld by the Supreme Court. Realizing the different interpretations that might be given to this approval of the Act, the Court was careful to state that

> Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency, and they are not altered by emergency.[80]

In this particular case the protective power of the states was read into all contracts. In general, any state has the right of preserving its own existence and, when exercised, this power is not contrary to constitutional guarantees.

Martial law may conflict with the guarantee of a trial by jury, but this has rarely been the case. In the *Milligan* case the lawyers for the United States thought that since the other

[79] The Washington case was *Block* v. *Hirsh*, 256 U. S. 135 (1921). The Housing Act cases were *Marcus Brown Holding Company* v. *Feldman*, 256 U. S. 170 (1921); and *Levy Leasing Company* v. *Siegel*, 258 U. S. 242 (1922).

[80] *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398 (1934), 425. See also William L. Prosser, "The Minnesota Mortgage Moratorium," *Southern California Law Review*, VII (May, 1934) 353. This view was reiterated in *Schechter* v. *United States*, 295 U. S. 495 (1935).

constitutional amendments had been given a rather loose construction, the same method of interpretation should apply to this amendment. The Court decided that the trial of Milligan was contrary to this guarantee because this was not a justifiable use of martial law. However, when martial law is correctly used it is not contrary to this guarantee, for martial law is restorative and not until the Constitution is restored may any conflict be possible. What the opinion of a higher court would be upon this point if the sentence of the military commission should extend beyond the period of the use of martial law, is uncertain. Even in West Virginia when there were several convictions for a long penitentiary sentence, all the prisoners were pardoned by the Governor. The only exception was the Nebraska case; in it the District Court held that "If the punishment is inflicted but a few days before the establishment of peace, it would seem absurd that sentences otherwise just, should at once expire."[81] Even if the sentence imposed by the military commission extends beyond the revocation of martial law, it is evident that the trial is an emergency measure and should be considered in the same manner as any emergency legislation. With respect to this last conclusion it must be remembered that martial law is not exercised by authority but only by fact, that is, when necessary. Consequently, there is little danger that martial law will ever be used except as an emergency measure.

The history of the use of martial law shows clearly that during the last few years it has been used primarily during labor trouble. As the struggle between capital and labor becomes more intense, strikes become more frequent, and violence breaks out; many state governments finally turn to martial law. Since the use of this instrument necessarily benefits one of the two parties to a dispute, it should be carefully administered. In the last few months martial law has been used in such a manner as to benefit labor in some instances and capital in others. To all executives who have the power of instituting martial law a word of caution should be directed—

[81] *United States* v. *Fischer*, 280 Fed. 208 (1922), p. 212.

that its use take place only during an actual emergency and for the sole purpose of restoring law and order. In preserving respect for law one side of the controversy may be affected adversely, but, when this occurs incidentally, and the real reason for the use of martial law is to preserve law and order, its use is undoubtedly justified. The courts will protect citizens from an arbitrary use of martial law. It is to be hoped that in the future executive officers will confine the use of martial law to its real purpose and not use this emergency measure to redeem campaign pledges or to get rid of political enemies.

The following conclusions may be reached:

First. Martial law is an emergency measure and can be used when necessary. The President of the United States and the governors of the several states judge the necessity, subject to disallowance by the courts.

Second. There are under the general term of martial law several distinct forms. Martial law in time of war may extend over (a) enemies and/or (b) civilians. Martial law in time of peace may be either (a) preventive or (b) punitive: punitive in time of insurrection or rebellion when the courts are not functioning in the proper manner, and preventive when it is desired that the troops restore order during industrial strife and minor disturbances.

Third. Martial law is a constitutional measure. It may be used as an incident to the war power; it may be used as a means of the executive to see that the laws are faithfully executed; or it may be used as an emergency measure resulting from the exercise of inherent power recognized by the Constitution.

Fourth. The President by virtue of his office and the powers delegated to him by Congress has the power to declare martial law and to carry it into effect. In the different states the governors exercise this power.

Fifth. Punitive martial law suspends the writ of habeas corpus. Martial law and the suspension of the privileges of the writ are not the same thing. Martial law is by far the

broader term. The writ of habeas corpus may be suspended when there is no martial law, but martial law necessarily includes the suspension of the writ.

Sixth. There are certain restrictions placed upon the use of martial law. It cannot be used in time of war outside the war zone. In time of peace it can only be used when the civil courts are not functioning in the proper manner. The person who institutes martial law is always liable to impeachment, and his actions, if arbitrary, are subject to disallowance by the civil courts.

Seventh. In conclusion, it must be remembered that martial law is not suspensory in nature but restorative. It does not supplant the Constitution, but it is the means employed to restore it to full operation. In short, we may say that martial law is not a suspension of the Constitution, but that its possibility was contemplated by the Constitution, its validity is tested by the Constitution, and the authority to establish it in proper cases is bestowed by the Constitution.

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